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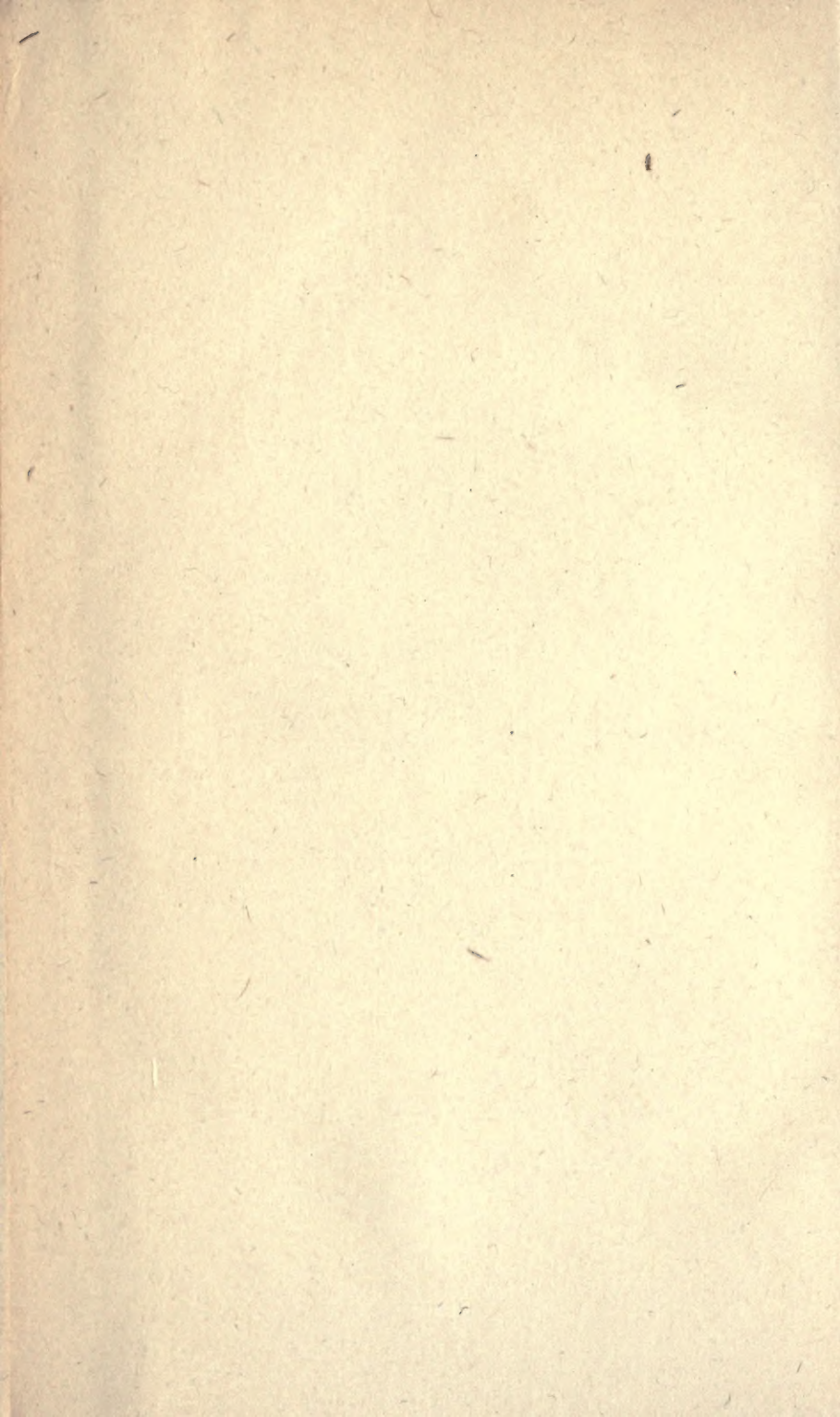
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*Maryland. Reports. Court of Appeals*  
REPORTS OF CASES

ARGUED AND DETERMINED

*Banks*

IN THE

COURT OF APPEALS

OF

MARYLAND.

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BY RICHARD W. GILL,

CLERK OF THE COURT OF APPEALS.

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VOL. I.

CONTAINING CASES IN 1843 & '44.

HERRICK & ALLEN

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NAMES OF THE JUDGES, &c.

110 21/6/9  
DURING THE PERIOD COMPRISED IN THIS VOLUME.

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OF THE COURT OF APPEALS.

Hon. JOHN BUCHANAN, Chief Judge.  
Hon. JOHN STEPHEN, Judge.  
Hon. STEVENSON ARCHER, Judge.  
Hon. THOMAS BEALE DORSEY, Judge.  
Hon. E. F. CHAMBERS, Judge.  
Hon. ARA SPENCE, Judge.

OF THE COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

OF THE COUNTY COURTS.

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Hon. JOHN STEPHEN, Chief Judge.  
Hon. EDMUND KEY, Associate Judge.  
Hon. CLEMENT DORSEY, do.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne and Talbot* counties.

Hon. E. F. CHAMBERS, Chief Judge.  
Hon. PHILEMON B. HOPPER, Associate Judge.  
Hon. JOHN B. ECCLESTON, do.

THIRD JUDICIAL DISTRICT—*Culvert, Anne Arundel, Montgomery and Carroll* counties.

Hon. THOMAS BEALE DORSEY, Chief Judge.  
Hon. THOMAS H. WILKINSON, Associate Judge.  
Hon. NICHOLAS BREWER, do.

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Hon. WILLIAM TINGLE, Associate Judge.

Hon. BRICE J. GOLDSBOROUGH, do.

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Hon. RICHARD H. MARSHALL, Associate Judge.

Hon. THOMAS BUCHANAN, do.

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Hon. JOHN PURVIANCE, Associate Judge.

OF BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.

Hon. ALEXANDER NISBET, Associate Judge.

Hon. W. G. D. WORTHINGTON, do.

ATTORNEY GENERAL.

JOSIAH BAYLEY, Esquire.



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CASES  
ARGUED AND DETERMINED  
IN THE  
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JUNE TERM, 1843.

THE STATE USE OF URATH STEVENSON *vs.* PHILIP REIGART.  
*June 1843.*

A testator devised a sum of money to his two grand-daughters, as and for their absolute property, to be taken and set apart for that purpose, out of his personal estate, and paid them as soon as conveniently may be done after his decease; the same to be understood as bequeathed unto them as their property respectively, and not to either of their respective husbands or their father, nor their step-brothers or step-sisters. The sum devised to one of the females, was demanded by her husband from the executors, and paid over to him by them upon a special agreement. In an action brought by the legatee against the administrators of her deceased husband to recover the money received by him, **HELD:** that it was not material whether the will gave her an absolute or a separate estate, and that her rights must depend upon the validity or invalidity of the agreement, in virtue of which the money was paid over to her deceased husband.

A contract founded upon an equitable duty, such as would be enforced by a court of equity, or upon a moral obligation, which no court of law or equity can enforce, or to do that which an honest man ought to do, or upon the waiver of a legal right by the party entitled to it, is maintained by a sufficient consideration.

The executors in this case held the wife's legacy as trustees; and wherever it is necessary for a husband to resort to a court of equity to get possession of his wife's legacy, that court will require him to do equity by making a settlement upon his wife and children, before it will lend him its aid in the

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State, use of Stevenson, *vs.* Reigart.—1843.

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recovery of it; and a promise by the husband to the executors to do that which equity would do in this case, is founded upon a sufficient consideration.

Where the husband receives the money of his wife, not in virtue of his marital rights so as to amount to a reduction into possession, but as her trustee and for her benefit, on the death of the husband it continues to be her property, for which she has a claim against his estate, and does not go to his personal representatives.

The agreement being valid and obligatory upon the husband, is to be considered as a substitution for the equity of the wife, which operated for the benefit of the wife and children, though not named, which a court of equity would specifically execute against the husband upon a bill filed for that purpose.

It has been settled by this court, that the wife's equity will prevail against an assignment of the husband for valuable consideration, or in payment of a just debt.

Where the husband receives his wife's legacy from the executors of a testator, making her a bequest, and promises to invest the money for her, does not invest according to the terms and conditions under which he received the legacy, and dies, his widow has a right to elect to consider him her debtor to the amount of it, as so much money had and received to her use.

Where the merits of an action at law depended in every aspect of it, upon the true construction of an agreement, every prayer which went to the right of action, and kept out of view the effect of the agreement, and so did not involve the true point of controversy between the parties, is considered as wholly abstract.

A court is not to be called upon to settle legal principles which have no relevancy to the case before them.

Where the orphans court, upon the application of a creditor of a deceased person, and the exhibition of the proof of his demand, passes a claim to be allowed, if paid by the executor or administrator, and upon appeal that order is reversed, such reversal constitutes no bar to the recovery of the same claim at law. The orphans court possessed only a *prima facie* jurisdiction, and the exercise of the appellate jurisdiction did not increase its effect.

An executor may interpose to protect the wife's equity in property under his control.

Ignorance of the law cannot be made available where there is a full knowledge of all the facts.

The case of *Bowley and Lamot*, 6 H. & J. 524, was held an exception to the general rule; for there a *forfeiture of title* would have been incurred, if the general rule, that a knowledge of the law in civil cases shall be presumed, where there is a full knowledge of the facts, had been permitted to operate; that was an attempt to charge the party with a fraudulent concealment of title in the absence of actual knowledge, upon the legal presumption which imputed knowledge.

An executor or administrator may retain the amount of a debt due him by his

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State, use of *Stevenson, vs. Reigart*.—1843.

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deceased testator or intestate, out of his estate, or its due proportion of assets, without passing his claim before the orphans court.

The act of limitations does not apply to the claim of an executor against his testator, who retained for his debt. He could institute no suit at law against himself.

APPEAL from *Baltimore* county court.

This was an action of DEBT, commenced on the 12th October 1837, by the appellant against the appellee and *Oliver Holmes*.

The plaintiff below declared on the bond of *Elizabeth L. Stevenson, Philip Reigart, H. Niles and Oliver Holmes*, dated 17th March 1832, for \$25,000, conditioned, that if the above bounden *E. L. S.* and *P. R.* should well and truly perform the office of administrator of *Josias Stevenson, junior*, late of *Baltimore* county, deceased, according to law, &c., then to be void.

The breach assigned was, that *Urath Stevenson*, executrix of *Josias Stevenson*, recovered a judgment in *Baltimore* county court against *E. L. S.* and *P. R.*, as administrators of *J. S., junior*, deceased, for as well the sum of \$1,000, as, &c., which was still unpaid, though the administrators had assets to satisfy the same. Writ of *fi. fa.* returned *nulla bona*, &c.

The defendants appeared and pleaded general performance, with an agreement, that the defendants should, under the plea of performance, be at liberty to give in evidence insufficiency of assets and any other matters that could be given in evidence under any plea to the merits. Seven days notice before the time of trial of such other matters being first given to plaintiff's attorney. All errors in pleading on both sides waived.

It was also agreed, that if the jury reject the claim of *ELIZABETH SCHRIVER*, they shall find a general verdict for the plaintiff for the amount of the judgment offered in this case. If they find in favor of the said claim, they shall find a verdict for the plaintiff for \$400. If the jury find in favor of *E. S. Schriver's* claim, its assets shall be marshalled, and the amount of them, as well as the amount of the debt, ascertained by *John Glenn* and *David Stewart, esquires*, and the judgment to be released on payment of such sum as they shall ascertain to be due.



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State, use of Stevenson, vs. Reigart.—1843.

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If the jury find the claim of *E. L. S.*, a like marshalling of assets shall be made by *J. G.* and *D. S.*, *Esq's*, and judgment to be released upon payment of the amount ascertained by them.

In all other suits upon the administration bond like judgments to be entered, a like marshalling of assets to be made by *J. G.* and *D. S.*, and like releases to be entered upon their amount. Nothing herein to prevent the plaintiff from appealing.

A commission to take proof was issued by consent to *Lancaster*.

It was then admitted that *Oliver Holmes* had died since his appearance; that *Josias Stevenson, junior*, died, and letters on his estate were issued to *E. L. S.* and *P. R.* in 1832, and that *J. S., Jr.*, and *Elizabeth Reigart* were married in 1827.

The jury found a verdict for the plaintiff, and assessed her damages at \$400.

At the trial of this cause, the plaintiff offered in evidence to the jury, the following judgment, *fieri facias* and return of said *fieri facias*, to wit:

URATH STEVENSON vs. PHILIP REIGART AND ELIZABETH STEVENSON, administrators of Josias Stevenson, Jr. In *Baltimore County Court*, January term 1837. Case. 23rd March 1837, judgment by confession for \$800 damages in the nar, and costs of suit; the damages to be released on payment of \$350, with interest from the 2nd day of July, 1832, and costs. To bind assets. Plaintiff's costs \$9.73 $\frac{3}{4}$ . 24th April 1837, *fi. fa.* issued to May term 1837. Returned *nulla bona*.

Test: THOS. KELL, *Cl'k Balto. Co'ty Court*.

The plaintiff also proved that administration upon the estate of the said *Josias Stevenson, junior*, had been duly committed to *Elizabeth L. Stevenson*, his widow, and to the defendant, on the — day of —, in the year 1832, and that assets came to their hands, but not to an amount sufficient to pay all claims against said estate.

The defendant then offered in evidence to the jury an admitted copy of the last will and testament of *Dr. Albert Dufresne*, who departed this life some time in the year 1823, and that his said will was duly proved, and that letters testamentary

were duly granted on the 13th day of August, 1823, to *Dr. Samuel Dufresne* and *Peter Reed*, two of the executors therein named; that *Maria Reigart*, one of the legatees therein named, afterwards departed this life, in her minority, without leaving any child, and without ever having been married, leaving her sister *Elizabeth L. Reigart*, (named in said testament and last will,) surviving her; that the said *Elizabeth L. Reigart* afterwards, to wit, on the 27th day of March, 1827, intermarried with the said *Josias Stevenson, junior*. The defendant further proved by *F. Slower*, a competent witness, that he was acquainted with the said *Josias Stevenson, junior*, in his life time, and with the said *Elizabeth L. Stevenson*, his wife, formerly *Elizabeth L. Reigart*, and that she is his niece; that some time in the year 1829, the said *Stevenson* and his wife were at the house of the witness in *Philadelphia*, and the said *Stevenson* then said that he wanted his wife's legacy, but that he did not like to go to *Lancaster* to get it; the reason why he wanted it was, that he could invest it in *Baltimore*; that it was his intention to invest it in *Baltimore* for his wife's exclusive use; that he wanted to protect the money for his wife. Witness told him that he considered it proper that he should do so, as the executors were trustees of this fund, and it was the evident intention of the grand-father to secure it for the benefit of his grand-daughters. He said he could invest it to more advantage in *Baltimore*, where it would yield eight or ten per cent.; and he frequently repeated, in the course of the conversation, that he intended to settle the money on his wife, and for her exclusive use. *Mrs. Stevenson* was present during the conversation. *Stevenson* told witness that the executors wanted security, and he spoke of *Mr. Reigart*, his father-in-law, as the chief obstacle to his getting the legacy, and he expressed a great deal of surprise at the conduct of the executors, as he did not want the money for himself, but to invest it in *Baltimore*, where it would yield more and be less troublesome to him. Witness thinks that he saw *Stevenson* afterwards, and *Stevenson* told him that he had bought a house in *Baltimore*, near the Circus, in the name and for the benefit of his wife. The defendant also proved

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State, use of *Stevenson*, vs. *Reigart*.—1843.

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by *Judge Dale*, a competent witness, that some time in the fall of 1828, *Stevenson* came to *Lancaster* for his wife's legacy. Said *Stevenson*, and *Dr. Samuel Dufresne*, one of the executors of *Dr. Albert Dufresne*, came together to his office, and spoke to witness about it. *Dr. Samuel Dufresne* made two objections to paying over the money; the *first* was that *Mrs. Stevenson* was yet in her minority, and that the property was hers, and that her husband could not execute a valid release to the executors; the *second* was, that he himself was entitled to it on the contingency that she died without issue; but he said that he would waive both objections if *Stevenson* would invest the property for *Mrs. Stevenson's* use. Witness suggested a conveyance by *Dr. Dufresne* to *Mrs. Stevenson*, of real estate in *Lancaster*, but *Stevenson* said that he did not want real estate in *Lancaster*; that he would rather have it in money, and said that he could invest it to more advantage in *Baltimore*. Eventually, they partly came to the conclusion that one-half should be paid in real estate, and the other half in money. Witness remarked to *Stevenson*, that if he received one-half in cash, it would be a very pretty beginning, but he said that he did not want any of it for himself; that he was in business already. They finally came to this agreement, that one-half, consisting of real estate in *Lancaster*, should be transferred in trust, for the use of *Mrs. Stevenson*, and that the other half should be given to *Stevenson*, and that he should invest it for the use of his wife, in real estate in *Baltimore*. Witness told him it would be his interest, as it was his duty, to invest it for his wife, and he said it was what he wished, and what he intended to do. *Stevenson* at all times repeated that he did not want the money for his business, but to invest it in real property for his wife. He came again to *Lancaster* in the spring of 1829, and he said that he had obtained the opinion of two of the ablest lawyers in *Baltimore*, that he was entitled to the legacies. Witness looked at the opinion, and read it over. Witness then told *Mr. Stevenson*, that by the laws of *Pennsylvania*, no person who was an executor, was required to pay over money, without a refunding bond and security. Witness



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State, use of *Stevenson, vs. Reigart.*—1843.

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referred him to the act of *Pennsylvania*, of 21st March 1772, entitled "An act for the most easy recovery of legacies," and read it to him from the book of laws, and at said *Stevenson's* request, witness lent him the book, which he carried to the office of his counsel in *Lancaster*. He returned and said that he could not give the required security in *Pennsylvania*, but could do so in *Maryland*. Shortly after this, *Dr. Samuel Dufresne* came over to my office and said that *Stevenson* was pressing him for the money, and that he would do almost any thing to get rid of the matter. Witness then went up to see *Mr. Reed*, the other executor, and told him that he thought *Dr. Dufresne* would give way, and *Reed* said, "zounds! the money shan't go out of my hands that way." During all this time, *Stevenson* said that he only wanted the money where it would be under his own eye, and of no more use to him. *Reed* came down to my office. It was finally agreed amongst them, that *Dr. Samuel Dufresne* should convey certain parcels of property in *Lancaster*, valued at \$9,000, to *Mrs. Stevenson*, for her use, and her use alone, and that the balance of the money, being \$10,520, or thereabouts, including the interest, should be paid to said *Stevenson*, to be by him invested in real property in *Baltimore*, for the use of his wife. Witness did not see the money paid, nor was he present when it was paid, but he prepared a release to the executors, which was executed both by *Mr. and Mrs. Stevenson*, and left in my hands, upon the understanding that it should be delivered over to the executors, upon the execution and delivery of the deed, for the real property in *Lancaster*. The reason why the deed was not executed and delivered at the time was, that *Mrs. Stevenson* made some objection to *Mr. Reigart*, as trustee, and said that it should remain until they returned to *Baltimore*, and that if they should make an arrangement, that some other person was to be inserted as trustee in the deed, and if not, then the deed was to be executed and delivered for the property, with *Mr. Reigart's* name as trustee. The deed was executed and delivered on the 22nd July 1829.

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State, use of *Stevenson*, vs. *Reigart*.—1843.

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The defendants then offered in evidence the said deed, which is as follows, to wit:

It is agreed that the appellee may, at the argument of this case in the Court of Appeals, read as a part of the record in the above case, a copy of the deed of trust from *Dufresne* and others to *Philip Reigart*; and that an argreement, if any further one be necessary, will be signed on the part of the appellants, to annex the same to the record, as a part of the bill of exceptions in which it is called for. It is further agreed, that the record shall be made out and sent up, without the actual introduction of said deed as a part of the evidence, a reference being made for its insertion in the place where it ought to be introduced.

The defendant further proved by said *Judge Dale*, that he considered the said deed as a literal execution of the agreement. The said witness on his cross examination further stated, that the release was executed in the month of May 1829, and that said *Dr. Samuel Dufresne* is dead, and that he died about ten years since. The defendant further proved by *Franklin Reigart*, a competent witness, that on the very day on which, as he understood, the money was paid, and before the money was paid, there was some conversation at the dinner table between *Stevenson* and the father of the witness, in relation to said legacies. *Stevenson* said that he had a great deal of trouble with the executors, and he complained that they demanded a bond with securities in *Lancaster*. The father of witness then told *Stevenson* that he could easily get rid of the difficulty, if he would do what he ought to do. *Stevenson* said that he had promised the executors to invest it in property in *Baltimore*, in his wife's name, and that he intended to invest it in *Baltimore* in her name, and that would clear the executors, but they still demanded security. Witness went after dinner on that day with *Stevenson*, to see *Schaum*, whom *Stevenson* asked to be his security, but *Mr. Schaum* declined to be so, upon which *Stevenson* said to him, that he, *Schaum*, would run no risk, as he *Stevenson* had promised the executors that if they would pay him the money he would buy property in *Baltimore* for the

use of his wife. *Stevenson* contended in conversation with the father of witness, that he was not bound to take any real property, and his father told *Stevenson* that the executors only required him to conform with the will, and that by the will the legacy was given, so that neither the father nor the husbands of the grand-daughters could touch it. They both were a little warm on the subject. Witness says that sometime in 1830, he was in *Baltimore*, and *Stevenson* there took him to a piece of property near the Circus, where repairs were being made, and told him that that was the property he had purchased. The defendant was proved by *Peter Reed*, a competent witness, that he was one of the executors of *Dr. Albert Dufresne*. Witness knew *Mr. Stevenson* after his marriage, and says he had cause to know him, as he troubled him very much about the legacy. They tormented *Dr. Dufresne*, the other executor, almost to death, he was sickly and crabbed; but witness stuck out, and told *Stevenson* that he would not pay him unless the law required it. Witness asked *Stevenson* why he did not do as the will required. Witness told him that he should not have the money unless he acted according to the will. *Stevenson* tried to get security, but could not. He said he would buy property in *Baltimore*. Witness told him that the will called for the money to go to the separate use of the girl, and the bond required was a bond to secure it to her separate use. Witness being cross examined stated, that the bond required by the executors, was a bond according to the act which *Judge Dale*, at the time of this conversation, read to *Stevenson* from the book. At the time of this conversation witness says, that one legacy had been paid to *Stevenson* in cash, and it was only about the other legacy that there was any dispute.

The plaintiff then further to maintain the issue on its part joined, proved by competent testimony that the said *Josias Stevenson* and the said *Elizabeth L. Reigart* were married on the 27th day of March, 1827. The plaintiff also offered in evidence the following depositions taken in a former suit, and



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to be received in this suit as evidence under the agreement which follows the said depositions:

MARYLAND, SCT: *The State of Maryland to William Frick, John Mathiot, Edward Purcell and John R. Findlay, of Lancaster, State of Pennsylvania, greeting:* Know that we have appointed you or any three or two of you, to be our commissioners to examine evidences, &c. Witness the honorable THEODORICK BLAND, Chancellor, this 2nd day of September, Anno Domini 1833. RAMSAY WATERS, Reg. Cur. Can.

Commissioners' oath, &c.

Depositions of witnesses produced, sworn or affirmed, and examined on the 15th February 1834, at, &c., by virtue of a commission, &c.

*Dr. Samuel Dufresne*, of, &c. deposeth as follows:

1. Do you know the complainant, and did you know *Josias Stevenson, junior*, late of *Baltimore* city, deceased, in his life time?

To the said first interrogatory he deposeth as follows: I do not know *Henry Stevenson*, the complainant, but I do know *Elizabeth L. Stevenson* and *Philip Reigart*, and I did know *Josias Stevenson, junior*, late of the city of *Baltimore*, deceased, in his life time.

2. Have you any knowledge of a legacy bequeathed to the said *Elizabeth L. Stevenson*, by her grandfather *Albert Dufresne*, of the city of *Lancaster*, in the State of *Pennsylvania*? If so, please state the amount thereof, and the circumstances by which the said legacy was attended, as regards the payment of it over, and annex to your answer an examined and authenticated copy of the last will and testament of the said *Albert Dufresne*, whereby said legacy was bestowed.

To the second interrogatory he deposeth as follows: By will, *Dr. Albert Dufresne*, late of, &c., deceased, dated the 8th of December, A. D. 1820, and duly proved on the 13th day of *August*, A. D. 1823, and letters testamentary thereupon issued to this affirmant and *Peter Reed*, two of the executors named in said will, the following bequest, amongst others, was made by the said testator in his said last will and testament.

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*2nd Item.* I do give and bequeath unto my two grand-daughters, *Elizabeth Reigart* and *Maria Reigart*, the children of my late dearly beloved daughter, *Albertina Reigart*, deceased, late *Albertina Dufresne*, the sum of eighteen thousand dollars, that is to say, the sum of nine thousand dollars to each of my said grand-daughters, as and for their absolute property, which said sum is to be taken and set apart for that purpose, out of my personal estate, by the executors of this my last will and testament, and the guardians of my said grand-daughters hereinafter named and appointed as soon as conveniently may be done after my decease, subject nevertheless, to the restrictions and limitations hereinafter mentioned and expressed.

*3rd Item.* It is my will, and I do order and direct, that the aforesaid legacy or sum of eighteen thousand dollars, shall be understood and deemed as given and bequeathed unto them as their property respectively, and not either to their respective husbands, or to their father, *Philip Reigart*, nor their step-brothers, or step-sisters, in case they or either of my said grand-daughters, *Elizabeth* or *Maria*, should happen to die without leaving any child or children, and if either of them, the said *Elizabeth* or *Maria*, should die without leaving any child or children, then the whole of the said legacy, or sum, shall descend, come and belong, and I do hereby give and bequeath the same unto the survivor of them. But in case they should both die, without leaving any child or children, then and in such case I do give and bequeath the whole and every part of the said legacy or sum of eighteen thousand dollars unto my son *Samuel Dufresne*, or his legal heirs and representatives.

The amount of the legacies under said will to each of the grand-daughters of said testator, as directed in said item of the will herein before particularly referred to by affirmant, was nine thousand dollars. *Josias Stevenson junior*, was here several times for the amount of the legacy claimed by him in the years 1828 and 1829. On the 25th of May 1829, he, *Josias Stevenson junior*, obtained in money and property from the affirmant and *Peter Reed*, executors of the last will and testament of said *Dr. Albert Dufrense*, deceased, and from them as

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guardians of the said *Elizabeth* and *Maria*, the two granddaughters mentioned in the item of the will herein before recited, *the sum of nineteen thousand five hundred and twenty-six dollars and eight cents, in the manner hereinafter mentioned; the sum of nine thousand dollars, and the interest thereon was paid to the said Josias Stevenson, junior, in cash, and the residue of the whole amount was paid by conveyance of real estate in the city of Lancaster, by deeds of trust, by which the property was to be held for the use of the said Elizabeth L. Stevenson.* This real estate consists of three parcels, to wit, &c.

The exact amount of cash paid to the said *Josias Stevenson, junior*, the affirmant does not recollect; affirmant has not a distinct recollection of every circumstance connected with the payment of the legacy; affirmant recollects that *Josias Stevenson, junior*, could not get the sureties required by the act of Assembly, requiring sureties to be given to the executors as aforesaid; affirmant expressed his anxiety to *Josias Stevenson, junior*, about securing the property to the said *Elizabeth L. Stevenson*; affirmant has no recollection of any promise made to him, that the money should be invested for her use, although he understood that such a promise had been made. He spoke to this affirmant, making known his intention to purchase some property in *Baltimore*. I think it was property near the Circus that he spoke of. The time of this conversation affirmant does not exactly recollect. The exemplification of the will of *Dr. Albert Dufresne*, deceased, being endorsed, complainant's exhibit A, I have carefully examined, with the original will now in the Register's office in the city of *Lancaster*, and find the same exemplification to be a correct, accurate and literal copy of said original will.

3. Have you any knowledge of the payment over of said legacy; to whom made, and under what circumstances? If so, detail the same, fully and minutely, and state the time thereof.

To said third interrogatory deposeth as follows: affirmant states that he has not a full recollection of all the circumstances connected with the payment of the legacy to *Josias Stevenson, junior*, but that as far as his knowledge and recollection ex-



tended, he has detailed the same in his answer to the second interrogatory.

4. Do you know whether or not, previously to said payment, or at the time thereof, the said *Josias Stevenson, junior*, on his part, expressly undertook and agreed to invest the amount of the said legacy in some property for the sole and separate use of the said *Elizabeth L. Stevenson*; and whether or not the said payment was not made to him upon his said undertaking and agreement, and at his solicitation? State all your knowledge of the matters enquired of, fully and in detail.

To the said fourth interrogatory he deposeth as follows: affirmant states that he has no other knowledge of any undertaking or agreement of the said *Josias Stevenson, junior*, or any other circumstances connected with the payment of the legacy to him, other than that detailed in answer to the second interrogatory; said *Josias Stevenson, junior*, did repeatedly solicit the payment of the legacy, and the delay arose from the anxiety of the executors and guardians to secure the interest of *Elizabeth L. Stevenson*; the legacy when paid as aforesaid, was paid by her consent; affirmant has not distinct recollection of any other matters enquired of in this interrogatory, than such as he has detailed in his answer to the second interrogatory, and in his answer given to this interrogatory.

*Benjamin Schaum*, of the city of *Lancaster*, gentleman, aged twenty-seven years, or thereabouts, being produced, sworn and examined on behalf of the defendants, deposeth, as follows:

1. Same as before.

To said first interrogatory he deposeth as follows: I do not know *Henry Stevenson*, the complainant, but I do know *Elizabeth L. Stevenson* and *Philip Reigart*, and did know *Josias Stevenson, junior*, late of the city of *Baltimore*, deceased, in his life time.

2. Same as before.

To said second interrogatory he deposeth as follows: Deponent has no other knowledge of the legacy bequeathed to *Elizabeth L. Stevenson*, by her grand-father *Dr. Albert Dufresne*, late of the city of *Lancaster*, deceased, nor the amount

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thereof, nor any of the circumstances connected with its being paid over, except that *Josias Stevenson, junior*, called upon him in the city of *Lancaster*, to become one of his sureties in a refunding bond that he wished to give the executors of *Albert Dufresne*, deceased, for the purpose of enabling him to receive the legacy enquired of in this interrogatory. This deponent declined becoming his surety; that he wished him to get some other person; that he did not wish to have any thing to do with it. The exemplification of the will of *Dr. Albert Dufresne*, deceased, being endorsed complainant's exhibit A, I have carefully examined, with the original will now in the Register's office in the city of *Lancaster*, and find the same exemplification to be a correct, accurate and literal copy of said original will.

3. Same as before.

To said third interrogatory he deposeth as follows: Deponent says that he has stated in his answer to the second interrogatory all his knowledge in reference to said legacy, and that he has no knowledge of any other circumstances, except such as are detailed in his answer to the second interrogatory.

4. Same as before.

To said fourth interrogatory he deposeth as follows: Deponent states that he has no knowledge of any of the matters enquired of in this interrogatory, having detailed in his answer to the second interrogatory every circumstance of which he has any knowledge or recollection.

WILLIAM WHITESIDE, Esquire, Register of the county of *Lancaster*, aged thirty-nine years, or thereabouts, being produced, sworn and examined on behalf of the defendants, deposeth as follows:

1. Same as before.

To said first interrogatory he deposeth as follows: Deponent says that he neither knows the complainant nor respondents, nor did he know *Josias Stevenson, junior*, in his life time.

2. Same as before.

To said second interrogatory he deposeth as follows: Deponent has no knowledge of the legacy bequeathed to *Elizabeth*

*L. Stevenson*, by her grand-father *Albert Dufresne*, deceased, or the amount thereof, nor the circumstances by which the said legacy was attended as regards the payment of it over, nor any other of the circumstances connected with the same, except so far as deponent is informed by the exemplified copy of the will of the said *Dr. Albert Dufresne*, deceased, being endorsed complainant's exhibit A. Deponent is the Register of Wills of the county of *Lancaster*, and he has carefully compared and examined the exemplified copy, endorsed as aforesaid, with the original will of the said *Dr. Albert Dufresne*, deceased, now on file in his office, and he finds upon such examination and comparison, that the same is a true, accurate and literal copy of the said original will, on file as aforesaid.

3. Same as before.

To said third interrogatory he deposes as follows: Deponent says that he has stated in his answer to the second interrogatory all his knowledge in reference to said legacy, and that he has no knowledge of any other circumstances, except such as are detailed in his answer to the second interrogatory.

4. Same as before.

To said fourth interrogatory he deposeth as follows: Deponent states that he has no knowledge of any of the matters enquired of in this interrogatory, having detailed in his answer to the second interrogatory every circumstance of which he has any knowledge or recollection.

*Samuel Dale*, of, &c., deposeth as follows:

1. Same as before.

To said first interrogatory he deposeth as follows: I do not know *Henry Stevenson*, the complainant, but I do know *Elizabeth L. Stevenson* and *Philip Reigart*, the respondents, and I did know *Josias Stevenson, junior*, late of the city of *Baltimore*, deceased, in his life time.

2. Same as before.

To said second interrogatory he deposeth as follows: Deponent says that he has knowledge of the legacy bequeathed to *Elizabeth L. Reigart*, now *Elizabeth L. Stevenson*, by her grand-father *Dr. Albert Dufresne*, late of, &c. Deponent says that



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the amount due to *Elizabeth L. Stevenson*, after the death of her sister *Maria*, under the will of her grand-father *Dr. Albert Dufresne*, deceased, was \$18,000, and at the time it was settled in 1829, when the executors were released, the legacies, with their interests, were \$19,526.08. Deponent says some time in 1828, *Josias Stevenson, junior*, came to the city of *Lancaster*, and demanded the legacy coming to his wife, under the will of her grand-father *Dr. Albert Dufresne*, deceased. *Dr. Samuel Dufresne*, one of the executors, agreed that he would give him the legacy coming to her, although she was under age, if he would take one-half of it in real property, for her use, and the other half he would pay in cash. Some deeds were drawn by me, and executed by *Dr. Samuel Dufresne* to that effect, and sent on to him. He the said *Josias Stevenson, junior*, some time after, came to *Lancaster*, perhaps in 1829, the time I do not exactly recollect, and said he would be entitled to recover. Deponent says that *Josias Stevenson, junior*, told him he could not obtain that security here, but could do it at home in *Baltimore*, and that he wondered why the executors should ask it of him. Deponent says he replied, that the executors were anxious to have the property secured to *Elizabeth L. Stevenson*. Deponent says that he *Josias Stevenson, junior*, then replied, if he got the cash, he would apply the same in purchasing real property in the city of *Baltimore* for her, *Elizabeth L. Stevenson's* use, and that it could be as well secured there as in the city of *Lancaster* for her. Deponent says that *Josias Stevenson, junior*, remained in the city of *Lancaster* at one time for about three days, during which time he frequently called at my office, and we had frequently conversations to the same effect, as what is detailed above. He *Josias Stevenson, junior*, borrowed the acts of Assembly from me, in relation to the refunding bond; he said he would take them and consult his attorney in the city of *Lancaster*. He the said *Josias Stevenson, junior*, finally agreed to take nearly the one-half in real property in the city of *Lancaster*, transferred for the use of his wife, and the balance in cash; and on the 25th day of May, 1829, he released and discharged the executors and guardians, to wit, *Dr. Samuel*

*Dufresne* and *Peter Reed*. Deponent has no recollection of what took place when the money was paid, nor of any conversation that took place at that time. Deponent has examined the exemplified copy of the will of *Dr. Albert Dufresne*, deceased, being endorsed complainant's exhibit A, and believes it to be a correct copy.

3. Same as before.

To said third interrogatory he deposeth as follows: Deponent states that he has not a full recollection of all the circumstances connected with the payment of the legacy to *Josias Stevenson, junior*, but that so far as his knowledge and recollection extends, he has detailed the same in his answer to the second interrogatory.

4. Same as before.

To said fourth interrogatory he deposeth as follows: Deponent states that he has no other knowledge of any undertaking or agreement of the said *Josias Stevenson, junior*, or any other circumstances connected with the payment of the legacy to him, other than that detailed in answer to the second interrogatory. Said *Josias Stevenson, junior*, did repeatedly solicit the payment of the legacy, and the delay arose from the anxiety of the executors and guardians to secure the interest of *Elizabeth L. Stevenson*. The legacy, when paid as aforesaid, was paid by her consent. Deponent has no distinct recollection of any other matter enquired of in this interrogatory than such as he has detailed in his answer to the second interrogatory, and in his answer given to this interrogatory.

The plaintiff then further proved, that the said *Elizabeth L. Reigart*, after the death of the said *Josias Stevenson, junior*, and after letters of administration had been granted to her and the defendant, *Philip Reigart*, to wit, on the 15th April 1837, presented to the orphans court of *Baltimore* county, a claim against the estate of *Josias Stevenson, junior*, an account of the said sum of money, by him so received, from the executors of the said *Dr. Albert Dufresne*, and for the purpose of showing the proceedings in-said orphans court, and the proceedings in the Court of Appeals, upon an appeal prosecuted

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from the decision of the said orphans court, in relation to the claim so referred, the plaintiff offered in evidence the following record of a judgment of the Court of Appeals, in a case in which *Henry Stevenson* and others were appellants and *Edward Shriver* and *Elizabeth L. Shriver*, his wife, formerly *Elizabeth L. Stevenson*, were appellees, to wit, which record of the Court of Appeals is sufficiently stated in the opinion of this court, for the purposes of this report.

The plaintiff proved further, that the said *Elizabeth L. Stevenson*, on the — day of —, in the year —, intermarried with the said *Edward Shriver*, and is now his wife.

All the foregoing evidence was received under an agreement of counsel made with the knowledge and assent of the court, that the same should be and was received, subject to all objections as to its admissibility and competency, in like manner as if objection had been or was made to its admissibility, before the same was received, and that any opinion of the court in regard to its competency, might be excepted to in like manner as if such opinions had been expressed upon objections made to the admissibility of the evidence before the same was given.

The defendant thereupon submitted the following prayer, to wit:

If the jury find from the evidence, that it was understood between *Mrs. Stevenson* (now *Mrs. Shriver*,) and her then husband *J. Stevenson, junior*, and *Reed*, one of the executors of *Dr. A. Dufresne*, that if said executor and the other executor and guardian of *Mrs. Stevenson*, or either of them, would pay him over the legacy of \$18,000, without requiring of him personal security, that the same would be secured to the separate use of his said wife, that he the said *Stevenson* would invest the same in property in *Baltimore*, for such use; and if they further find, that he promised said parties to make such investment for the consideration aforesaid, and never claimed title to said legacy as of his own absolute property, or denied, but that the same should be held by him for his wife's use; and if they further find, that said *Reed* and *Mrs. Stevenson*, in consideration only of said premises and undertaking of said *J. Steven-*



son, did agree and consent, and so inform him the said executor, *Dr. S. Dufresne*; and if they also find, that without advising said wife or said *Reed*, or said *S. Dufresne*, that he did not intend to comply with said promise or undertaking, he said *J. Stevenson* received said legacy of \$18,000, in property in *Lancaster*, secured to the use of his said wife, and in money \$9,000, and added the balance thereof, or never told them or either of them, that he intended to hold said money in his own right, that then the jury are to allow defendants, *Shriver* and wife, a rateable dividend on the account against the estate of said *J. S. Jr.* out of the assets of said estate, given in evidence in this case; of which opinion the court (*PURVIANCE, A. J.*) was, and so instructed the jury.

The plaintiff then, upon the evidence stated in the foregoing bill of exceptions, further prayed the court as follows:

1. That according to the true construction of the will of *Dr. Albert Dufresne*, the legacy thereby bequeathed to *Elizabeth Reigart*, and the legacy thereby bequeathed to *Maria Reigart*, and which, upon her death, survived to *Elizabeth*, vested absolutely in her upon her marriage with *Josias Stevenson, junior*.

2. That the said *Josias Stevenson, junior*, by his marriage with the said *Elizabeth Reigart*, was, in virtue of his marital rights, entitled to demand and receive of the executors of *Dr. Albert Dufresne*, the bequests mentioned in the preceding prayer.

3. That the executors of *Dr. Albert Dufresne* had no right to hold or to invest the bequests mentioned in the preceding prayers, to the sole and separate use of the wife of the said *Josias Stevenson, junior*.

4. That the executors of *Dr. Albert Dufresne* could not lawfully require or exact of the said *Josias Stevenson, junior*, after his said marriage, as a condition to the payment over to him of the said bequests mentioned in the preceding prayers, any stipulation, promise or agreement, that he would hold or invest the same for the sole and separate use and benefit of his wife.

5. That such portion of the bequests mentioned in the pre-

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ceding prayers as was received by *Josias Stevenson, junior*, after his marriage with the said *Elizabeth L. Reigart*, and during her coverture with him, and in virtue of his marital rights, became his absolute property, and that the claim now preferred against his estate by his widow, for money thus received by him, cannot be supported.

6. That the decree of the Court of Appeals, passed at December term 1837, in the case of *Henry Stevenson* and others against *Edward Shriver* and *Elizabeth Shriver* his wife, is final and conclusive upon the parties to said cause, and that the claim advanced by the said *Edward Shriver* and wife in said cause, is not a lien or charge upon the estate of *Josias Stevenson, junior*.

7. That no agreement made by *Josias Stevenson, junior*, with *Elizabeth L. Stevenson*, his wife, or with any person for her, after his marriage with her, and in consideration thereof, to receive and hold to her separate use, or to receive and invest in property for her separate use, money that belonged to her in her own right, before and at the time of said marriage, and upon which the marital right of the said *Josias* attached by said marriage, was or is binding upon the said *Josias Stevenson, junior*, or his administrators, nor can such contract made as aforesaid be the foundation of any claim on the part of the said *Elizabeth* against the personal estate of the said *Josias*, since his death.

8. If the jury believe that he was bound to invest this property by the will of *A. Dufresne*, made any promise to invest the money received from the executors of *A. Dufresne*, that such promise was made under a mistake of law, and is not binding upon him.

9. If the jury believe that *Josias Stevenson* received of the executors of *A. Dufresne*, the money in question, and applied the same about his ordinary business, with the assent of his wife, and that neither the executors of said *Dufresne*, nor his wife, required its separate investment during his life time, that then the said wife has no claim upon the estate for his money so received and used by said *Stevenson*.

10. That there is no evidence to show a debt due to *Shriver* and wife, or either of them, from the estate of *Josias Stevenson, junior*.

11. That *Edward Shriver* and *Elizabeth L. Shriver* his wife, late *Elizabeth L. Stevenson*, and widow of *Josias Stevenson, junior*, cannot in right of the said *Elizabeth L. Shriver*, the administratrix of said *Josias Stevenson, junior*, retain the amount of the claim produced in evidence in this cause, and sought to be established as a debt due to her from the estate of the said *Josias Stevenson, junior*, or any part thereof, because the same is not passed by the orphans court, and therefore, that the jury in marshalling the assets of the estate of the said *Josias Stevenson, junior*, in this cause, cannot consider or treat the said claim as a debt due from the said estate.

12. That if the jury shall believe that the promise and agreement testified to by *Reed* and *Reigart* was made by the said *Josias Stevenson, junior*; and shall also believe that the sum of money claimed by *Edward Shriver* and *Elizabeth L. Shriver*, his wife, was not paid to the said *Josias Stevenson, junior*, under said agreement and promise, but if the jury find that a new agreement was made between said *Stevenson* and *Dale*, the attorney and agent of the executors, that said *Stevenson* should receive deeds of real estate in *Lancaster*, investing the half of the money in the hands of said executors in said real estate for the separate use of the wife of said *Stevenson*, and that the remaining half should be paid to him in cash, to be at his own disposal, then no debt was due to *Shriver* and wife for which defendants can claim a deduction in marshalling the assets in this case.

13. That there is no evidence in this case to show that *Josias Stevenson*, either at the time, or after he consented to the investment of a portion of his wife's legacy in real estate in the city of *Lancaster*, for her separate use, promised the executors of *Dr. Albert Dufresne*, or *Samuel Dale*, or his said wife, that he would invest the balance of said legacy upon its being paid to him in property for her use, or that he would in any manner hold it for her use.



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14. If the jury find from the evidence, that *Josias Stevenson, junior*, consented that one half, or about half of the legacy given his wife by the will of *Dr. Albert Dufresne*, should be invested in real estate for her sole use, he, the said *Josias*, was under no legal, moral, or equitable obligation, to make any further provision for the sole use of his said wife out of the balance of the said legacy.

15. That if the jury believe from the evidence, that *Josias Stevenson, junior*, gave his consent that one half, or about half of the legacy given his wife by the will of *Dr. Albert Dufresne* should be invested in real estate for her sole and separate use, and if they further believe, that at or after the time of giving such consent, he promised the executors of *Dr. Albert Dufresne*, to invest the balance of said legacy upon its being paid to him in cash for the sole and separate use of his said wife, that such promise was without consideration, and not binding upon him in law.

16. If the jury believe that *Josias Stevenson* made the promise mentioned in the testimony of *Reed* and *Reigart*, to invest the legacies of his wife for her sole use; and if they further believe that such promise was made upon the condition that the whole amount of said legacies should be paid to him; and if they find that this condition was not complied with, but that near half the amount of said legacies was invested by the executors of *Dr. Albert Dufresne* in real estate, and that the balance only was paid to said *Stevenson* in cash, that then the said promise was not binding on him, and no claim founded upon it can be a charge against his estate.

17. If the jury believe from the evidence, that *Mrs. Stevenson* was present with her husband, in *Lancaster*, when he demanded the legacy willed to her by *Dr. Albert Dufresne*, from his executors; and was also present when the portion of said legacy which her said husband received in cash was paid to him, and that she did not demand of him or of the executors, that such portion or any part of it should be invested or held for her sole use, but gave her free consent to the said payment to her said husband without condition or qualification,

then the defendant cannot set up by way of claim on his estate the amount of money so paid him with interest.

18. The plaintiff prays the court to instruct the jury, that if they shall believe from the evidence in the cause that the executors of the said *Dr. Albert Dufresne*, after the intermarriage of the said *Elizabeth L. Reigart* with the said *Josias Stevenson, junior*, and during the life time of the said *Josias Stevenson, junior*, and with the consent of the said *Josias Stevenson, Jr.*, conveyed certain real estate in the city of *Lancaster*, by deeds of trust, for the sole and separate use of the said *Elizabeth L. Stevenson*, to the value of one-half, or about one-half of the said legacies mentioned in the preceding prayers; and at the same time, or about the same time, paid to the said *Josias Stevenson, junior*, in cash, the whole residue of said legacies, in full payment and discharge of the said legacies; and shall further believe from the evidence in the cause, that at the time of such payment, in cash, to the said *Josias Stevenson, junior*, he the said *Josias Stevenson, junior*, as an act contemporaneous with such receipt of the said money, and as part of the *res gestæ*, executed and delivered to the said executors, a receipt, in writing, in nature of a deed of release in respect of such legacies, and that the same deed of release was then and there accepted and received by the said executors; and shall further believe, that no other receipt, release or other instrument of writing whatever, was then, or at any other time, either before or afterwards, executed or signed by the said *Josias Stevenson, junior*, or written by him or by his direction, in respect of the said sum, so by him received, or in respect of his said legacies, then the said deed or release is the best evidence of the capacity in which the said *Josias Stevenson, junior*, received the said amount, and of the trust, if any, on which he received the same, and that parol evidence cannot be received of its contents, without shewing said deed of release to be lost, or otherwise accounting for its non-production.

19. That limitation is a bar to the claim of *Elizabeth Stevenson*, as respects the claim of the plaintiffs in this case.

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The court (PURVIANCE, A. J.) refused to grant the said prayers, or any of them, but rejected the same, and each and every of them; to which refusal of the court to grant the said several prayers, and to the refusal of the court in respect of each several prayer, and to grant such several prayer, the plaintiff excepted.

The parties filed the following agreement, to wit:

It is agreed that the record in this case shall be considered as made out in full, although the record does not contain at length the record in the case of *Urath Stevenson* against the administrator of *Josias Stevenson, junior, fi. fa.* thereon, and sheriff's return of *nulla bona*; it being agreed, in order to facilitate the making up of the record, and to save expense, that the short copy should have the same effect in the argument of the case as if the full record had been introduced; the short copy having by agreement been substituted in the place of the record in full. It is also agreed, that in the record of the case of *Henry Stevenson and others, appellants, vs. Edward Shriver and Elizabeth L. his wife, formerly Elizabeth L. Stevenson*, shall be considered as included in the record in this case, without actual insertion; it being agreed that the same may be read in the argument of this case as a part of the record, from the record thereof in the Court of Appeals, or from the printed report thereof.

Both parties appealed to this court.

The cause was argued before BUCHANAN, C. J., STEPHEN, DORSEY, CHAMBERS and SPENCE, J.

By McMAHON, SPEED and R. JOHNSON, for the appellant, plaintiff below, and

By W. SCHLEY for the appellee, defendant below.

STEPHEN, J. delivered the opinion of this court.

The question involved in this case being one of some novelty in point of principle, and the amount of the property de-



pending upon the decision of it being of considerable value, and therefore materially affecting the interests of the parties litigant, it has received, as it demanded, the careful and deliberate consideration of this court. The case has been ably and ingeniously argued by the counsel engaged for the respective parties, and much aid has been derived during our researches, from the light thrown upon it by the discussion at the bar. Upon the fullest examination we have been able to bestow upon it, we have come to the conclusion that there is no error in the decision of the court below, and that the judgment there rendered ought to be affirmed. In deciding upon the merits of this controversy, we think that the true construction of the will of the testator in reference to the character of the legacy given to his grand-daughter, *Mrs. Stevenson*, that is, whether it was absolute, or for her separate use, is wholly immaterial and irrelevant, and that the rights of the parties must depend upon the validity or invalidity of the agreement, under or in virtue of which it was paid over to her husband. Under this aspect of the case, many of the prayers made by the appellants' counsel in the court below, which kept out of view the operation and effect of that agreement, were wholly abstract, and did not involve the true point in controversy between the parties, and therefore received at the hands of the court that fate, which upon established legal principles, unavoidably awaited them, it being the undoubted duty of the court not to wander or suffer themselves to be led into the wide and extended fields of legal science, for the purpose of solving or settling legal principles having no relevancy to the case before them, but to confine themselves to those questions of law alone, which arise upon the facts and circumstances established by the testimony, and which properly belong to the case before them. The great and leading question therefore in this case seems to be, whether the agreement made by the husband of *Mrs. Stevenson* with the executors of her grand-father's will, if satisfactorily proved to have existed, was founded upon a sufficient consideration to render it obligatory upon him, so as upon the non-fulfilment of it on his part, to create the relation

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of debtor and creditor between him and his wife. We cannot entertain a doubt of the sufficiency of the consideration to support his promise to the executors, in reliance upon which they paid him the legacy. If it was founded upon an equitable duty, such as would be enforced by a court of equity, that alone seems to be sufficient to give it efficacy, and binding operation, even in a court of law. In *Cowper's Rep.* 290, *Lord Mansfield* says, "where a man is under a moral obligation which no court of law or equity can enforce, and *promises*, the honesty and rectitude of the thing is a consideration. As if a man promises to pay a just debt, the recovery of which is barred by the statute of limitations; or if a man, after he comes of age, promises to pay a meritorious debt, contracted during his minority, but not for necessities; or if a bankrupt in affluent circumstances, after his certificate, promises to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of writing by the statute of frauds. In such and many other instances, though the promise gives a compulsory remedy, where there was none before either in law or equity, yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright man are a sufficient consideration;" and *Buller, Justice*, in his opinion says, "the true rule is, that wherever a defendant is liable in equity and conscience to pay, that is a sufficient consideration;" and he says that the rule, that to constitute a valid consideration for a promise, there must be a benefit to the promisor or loss to the promisee, is much too narrow. The executors in this case held the wife's legacy as trustees, and wherever it is necessary for a husband to resort to a court of equity to get possession of his wife's legacy, that court will require him to do equity, by making a settlement upon his wife and children, before it will lend him its aid in the recovery of it. This is considered to be an equitable duty on his part, and formed, we think, a sufficient consideration for his promise in this case. The waiver moreover on the part of the executors of the refunding bond, which it appears by the laws of *Pennsylvania* they had a right to require, formed an additional consideration

for the agreement on the part of the husband for the benefit of his wife. It is also to be considered in the decision of this controversy, that according to the proof, the husband received the money of his wife, not in virtue of his marital rights, so as to amount to a reduction of the legacy into possession, but as her trustee and for her benefit; on the death of the husband therefore, it continued to be her property, for which she had a claim against his estate, and did not go to his personal representatives. On this point the authorities hold a language uniform, explicit and unequivocal.

The agreement then being valid and obligatory upon the husband, is to be considered as a substitution for the equity of the wife, which operated for the benefit of the wife and children, though not named, and which a court of equity would specifically execute against the husband, upon a bill filed for that purpose. In support of this doctrine, see the case of the *Attorney General vs. Whorwood*, where *Lord Hardwick* recognises the validity of an agreement made by a husband with a trustee, for the purpose of obtaining his wife's money out of his hands, which the trustee had received upon the sale of her father's estate, and decreed an execution of the agreement, on the death of the husband, against his representatives. The agreement was, to invest the money in the purchase of land, to be settled for her benefit for life, and if there were no children, then on himself. In that case his lordship said "that it had been truly insisted, on behalf of the wife, that on the husband's application for the money, the court would undoubtedly have ordered a further settlement." If then the parties did not come into court, but acted among themselves, and the husband had agreed to do that which the court would have directed, had the wife insisted on it in a proper suit, it should have its full effect. It has been solemnly settled by this court, and has also been decided by *Chancellor Kent*, in *New York*, that the wife's equity will prevail against an assignment of the husband for valuable consideration or in payment of a just debt. See 4 *G. & J.* 282; 5 *John. C. Rep.* 484, where *Chancellor Kent* also decides, that the court may, in its discretion,



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give the whole or part only of the property to the wife according to the circumstances of the case; to same effect, see 6 *John. C. Rep.* 178.

If we are correct in the views which we have taken, as to the binding and operative effect of the agreement of the husband in this case, the next question which arises is, did his failure to invest according to the terms and conditions under which he received the legacy, give to his wife the right to elect to consider him her debtor to the amount of it, as so much money had and received to her use? Upon principle, and authority, we think it did give her that right. He received the money upon a special trust and confidence, that it would be invested for her benefit; he received it as her trustee; and upon his failure to make that investment, the consideration upon which he received it failed, and she had a right to consider it as so much money had and received for her use. See 1 *Harr. & Gill*, 258, where it is said, "if one man takes another's money to do a thing, and refuses to do it, it is a fraud; and it is at the *election* of the party injured, either to affirm the agreement, by bringing an action for the non-performance of it, or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received for his use." The action for money had and received is an equitable action, and equally as remedial in its effects as a bill in equity. In *Moses vs. Macfarlan*, 2 *Burr.* 1012, Lord Mansfield says, "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." There can be no doubt that the wife may be a creditor against her husband's estate, after his death. 1 *Harr. & Gill*, 280; *Powell on Contracts*, 109; 3 *P. Will.* 335; 1 *Vernon*, 427. These last cases, it is true, were cases in equity, and there were no creditors to contend with, but they shew that as between husband and wife the relation of debtor and creditor may exist; and in the case in *Vernon*, the wife was administratrix of her husband, and was permitted to retain for her claim out of his assets. But whether the debt be legal or equitable, this court have decided,

it is equally within the power and jurisdiction of the orphans court to allow it. In this case, however, for the reasons already given, we think the claim of the wife supported by such considerations as constitutes it a debt recoverable in a court of law. We do not think that the decision of this court, reversing the decision of the orphans court allowing the claim, can operate to bar the recovery, it being the exercise of an appellate jurisdiction, reviewing the order of an inferior court, possessing in reference to the subject before it, a *prima facie* jurisdiction only. As to the objection, that the executors transcended their powers in demanding the execution of the agreement, before they would consent to pay over the money to the husband, we think that it is entitled to no consideration. The agreement having been entered into by the husband, with a full knowledge of all the facts, without fraud or surprise, and being founded upon a valid consideration, cannot be otherwise than obligatory. It seems, however, that the executors may interfere to protect the wife's equity; for in 5 *John. C. Rep.* 473, *Chancellor Kent* refers to a case where it appears the bill was filed by the executor of the testator, to stay the husband who had instituted a suit in the spiritual court for his wife's legacy. *Lord Mansfield* said, it made no difference who was plaintiff in equity, and he directed that the money should be disposed of for the benefit of the wife. We do not think that the husband can shelter himself under a mistake of the law; he not only appears to have taken legal advice upon the subject of his marital rights, in relation to the legacy, but if he had not, there is, we think, nothing in this case to except it out of the operation of the general rule, that ignorance of the law cannot be made available with a full knowledge of all the facts. The case of *Bowley and Lammott* was decided upon a principle wholly inapplicable to this case. That was a case where a forfeiture of title would have been incurred, if the general rule, that a knowledge of the law in civil cases shall be presumed, where there is a full knowledge of the facts, had been permitted to operate; it was to charge the party with a *fraudulent* concealment of title, in the absence of actual

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knowledge, upon the legal presumption, which imputed knowledge. In that case, the application of such a principle was looked upon as being too monstrous and unjust, to receive for a moment the countenance or sanction of the court; it was a doctrine most glaringly unjust, and alike repudiated by the rules of morality, a refined sense of justice, and the principles of law. It was therefore rejected. We think there is nothing in the objection, that the claim of the wife against her husband's estate had not been allowed by the orphans court; the decision of that court, whether favorable or unfavorable, not having a conclusive effect upon the question, when submitted to a court of law for adjudication.

We believe we have now taken a view of all the questions involved in the prayers made by the respective parties in the court below, and upon the best consideration we have been able to give to the subject, we approve of the judgment of that tribunal, and think it ought to be affirmed.

The *first*, *second*, *third* and *fifth* prayers made to the court below by the counsel for the plaintiff, were properly rejected, as being mere abstract legal propositions, putting the agreement entirely out of view, upon which the defendant rests her claim to retain.

The *fourth*, we think, was properly rejected for the reasons before expressed.

The *sixth* prayer, as to the binding effect of the decision of the Court of Appeals, in the case of the appeal from the orphans court, was properly rejected for the reasons already given. The effect of the agreement, as now proved, not being in the view of that court when the decision was made.

The *seventh* prayer was, we think, also properly rejected; for the reasons already given, we think the agreement was a valid one, and supported by an adequate consideration.

The *eighth* prayer, founded on a mistake of law, for the reasons already assigned, was likewise properly rejected.

The *ninth* prayer was also properly rejected; under the agreement, it was his duty to invest; no laches is imputable to the wife or executor, so as to create a forfeiture: if a delu-



sion existed, it sprung from his bad faith, he having always declared his intention to be, to make the investment according to contract.

The *tenth* prayer was also properly rejected, for the reasons already given. The proposition contained in this prayer was too untenable to receive for a moment the sanction of the court, that is, that the claim of the wife was totally destitute of evidence to support it.

The court, we think, were right in rejecting the *eleventh* prayer, for the reasons already given; the claim, we think, did not require the sanction of the orphans court.

The court, we think, were right in rejecting the *twelfth* prayer, there being no evidence in the case to sustain it.

The court were clearly right in rejecting the *thirteenth* prayer; there was evidence sufficient to go to the jury to prove such promise.

The court were right in rejecting the *fourteenth* prayer, for the reasons before stated.

The court, were right in rejecting the *fifteenth* prayer, for reasons which have been already stated; there was a sufficient consideration to sustain the promise.

The court were right in rejecting the *sixteenth* prayer, there being no evidence to warrant it.

For reasons already given, the court were right in rejecting the *seventeenth* prayer; if the agreement was a valid one, her consent when the money was paid under it, would not annul or vacate it. She was entitled to the benefit of it, and her consenting to the payment of the money when it was paid, without at that time annexing any conditions or qualifications to such payment, would not deprive her of the benefit of that agreement. No stipulation on her part was necessary for the protection of her interest. She had a right to rely upon and claim the benefit of the contract which had been made by the executors for her use.

The court were also right in rejecting the *eighteenth* prayer. The release had nothing to do with the agreement; the agreement having been made, the release was made to

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discharge the executors, it was only collateral to the agreement. The prayer was clearly not warranted by the proof, and was, therefore, properly rejected.

The *nineteenth* prayer was properly rejected. *Mrs. Stevenson* being one of the personal representatives of her husband, could institute no suit against herself, at law; the act of limitations, therefore, did not apply to the case, and created no bar to the recovery of her claim.

The court were right in granting the defendant's prayer; the record containing sufficient evidence to warrant the jury in finding the facts upon which it was predicated. The judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

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PATRICK O'REILLY vs. GILBERT MURDOCH.—June 1843.

The act of 1791, ch. 68, gives jurisdiction to justices of the peace, where the real debt and damages do not exceed ten pounds, current money, or one thousand pounds of tobacco.

The act of 1809, ch. 76, gives jurisdiction to the justices of the peace, in all cases where the real debt and damages doth not exceed the sum of fifty dollars.

Both these acts, in defining jurisdiction, refer not to the sum claimed, but to the sum recovered, as the standard by which it was to be regulated.

By the act of 1813, ch. 162, the sphere of the justices power was extended to trespasses upon real property, by cutting, destroying or carrying away timber or wood from off any land where the damage should not exceed the sum of fifty dollars. The test of jurisdiction here also is the sum recovered.

By the act of 1824, ch. 138, jurisdiction is given to the justice to injuries over real property, for which t. q. c. f. might be maintained, and where the damages "*laid or claimed*" should not exceed fifty dollars.

The act of 1825, ch. 51, extends the jurisdiction of justices to trespasses of either real or personal property, where the *damages claimed or laid* shall not exceed the sum of fifty dollars.

The act of 1834, ch. 296, gives jurisdiction to justices of the peace, in all cases where the debt or damages "*laid or claimed*" shall not exceed the sum of fifty dollars, excepting from the operation of that act, actions of slander, assault and battery, and where titles to land shall come in question.

The act of 1824 first introduced a new test of jurisdiction, by making it to

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depend upon the damages claimed or laid, and from that time all subsequent laws providing for the recovery of damages, have adopted the same standard. If a plaintiff estimates his damages at a sum not exceeding fifty dollars, jurisdiction is given to a single magistrate, because the sum recovered cannot exceed the sum claimed; but where the nature of the injury is such as to justify a claim of damages to a larger amount in his declaration, the established jurisdiction of the county court is not taken away.

These views are not to be considered as in any respect applicable to cases of contract, but are intended to be confined to actions for torts.

In an action against an innkeeper, for negligently taking care of the plaintiff's horse in his stable, so that he was killed, the damages claimed exceeded fifty dollars. **HELD:** that the county court had jurisdiction of the action.

Where, in the progress of a trial, the defendant excepted to instructions granted in favor of the plaintiff, and afterwards the judgment was arrested, but upon the appeal of the plaintiff, reversed, this court will not enter final judgment, but remand the cause for judgment on the verdict to the county court, in order that the defendant may have an opportunity of appealing from the instruction given against him.

*APPEAL from Anne Arundel County Court.*

This was an action of *trespass upon the case*, brought by the appellant against the appellee on the 16th April 1841. The plaintiff declared for that whereas, according to the customs and laws of this State, all innkeepers who keep common inns to entertain travellers, and cattle of travellers, upon the roads where such inns are kept, and who put up at, and set up their horses, &c., in the same, are bound to keep the cattle, goods and chattels of such travellers, both by day and night, being within those inns, without detriment, damage, diminution or loss, so that no hurt, detriment or damage whatsoever, shall happen to the said guests, or to their cattle, goods or chattels, or any part thereof, through the default or carelessness of the said innkeepers or their servants; and whereas, the said defendant, on the 28th October 1840, and before, kept, and from thence hitherto hath kept and still keeps, as master thereof, a certain common inn, at the city of *Annapolis*, in the said county, commonly called or known by the name of the Farmers' Inn; and while the said defendant so kept, as master thereof, the said inn, to wit, on the day and year aforesaid, the said plaintiff, travelling along and by the place where the said inn then was and stood, with a mare of the said plaintiff, then and there



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stopt at the said inn, and brought the said mare into the said inn, and set up the said mare at and in the said inn, and left and lodged the said mare therein, for the said mare to be there baited, entertained, guested and fed, and taken good care of therein, as in a common and public inn until the same should be called for again by the said plaintiff for hire and reward, as used and customary in such inns to be paid to the said defendant, for the standing, lodging, baiting, entertaining, guesting, feeding and taking care of the said mare, at and in the said inn; yet the said plaintiff through the default, neglect and mere carelessness of himself and his servants, in this behalf, while the said mare so remained and continued at and in the said inn, for the purpose and on the cause aforesaid, to wit, on the same day and year aforesaid, at the city aforesaid, in the county aforesaid, so badly, carelessly and negligently took care of the said mare, that during that time, to wit, on the same day and year aforesaid, at the county aforesaid, the said mare, of the price of one hundred and thirty dollars, was in the said inn, through the mere default of care and neglect of the said defendant and his said servants, killed, by having her neck broken, either by the said *Gilbert* or some of his servants, or some other person or persons unknown to the said plaintiff, so that the said mare on the day and year aforesaid, at the city and county aforesaid, died, whereby the said plaintiff saith he is injured, and hath damage to the value of *three hundred dollars*, current money, and therefore he brings his suit, &c.

The defendant pleaded *NON CUL*: upon which issue was joined. The jury assessed the plaintiff's damages at \$47.50. But because the damages did not exceed \$50, the county court arrested the judgment, and the plaintiff appealed.

At the trial of this cause, the plaintiff to sustain the issue joined on his part, proved to the jury by a competent witness, that the plaintiff on some day in the month of October eighteen hundred and forty, rode on horse-back with the witness to the city of *Annapolis*, and as witness believes, turned into defendant's yard, the said defendant being an inn-keeper regularly licensed; and by another witness that in the month of Octo-

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ber eighteen hundred and forty, he having several horses in defendant's stable, he went into the stable with the ostler at ten or eleven o'clock at night, and there found every thing right; that the next day at day-break, or thereabouts, the ostler informed him that a horse in the stable was hung, and that going into the stable he found a horse which he afterwards was told by defendant was plaintiff's, dead, and that it came to its death by pressing its head through a hole between its stall and the adjacent stall, which hole deponent believed was broken by the horse in one or other of the stalls. The deponent also stated, that he had several horses at the stable for several days, and that they were well taken care of by the ostler, and that the stalls in defendant's stable were in good condition, as well as could be found elsewhere; and by a third witness the said plaintiff proved, that the witness was ostler to the defendant in the month of October eighteen hundred and forty, and that finding the horse for which this action is brought, in the defendant's stable yard, he took it into the stable and there kept it well for several days, during all which time he enquired of defendant and others about the premises for the owner of the horse, but without discovering him; and that he did not discover who was the owner until after the horse was dead; that on the night on which the horse died, he was in the stable at ten or eleven o'clock at night, and found every thing was right; that before day-light on the succeeding day he was again in the stable, when he discovered that the horse in question was dead, and that it came by its death by pressing its head through a hole between its stall and the adjacent stall, which hole was made by breaking off a part of the plank between the two stalls, which was done either by the horse in question, or horse in the adjacent stall; that the stalls in the defendant's stable were in good condition, and that as fast as any accident happened to any of them it was repaired.

Whereupon the plaintiff by his counsel prayed the court to instruct the jury:

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That if the jury should be of opinion from the evidence, that the horse of the plaintiff was in the stable of the defendant as inn-keeper, and was there killed, the plaintiff is entitled to recover damages for such loss, without proof that his death was the consequence of a want of care on the part of the defendant or his servants.

Whereupon the court (DORSEY, C. J., and BREWER, A. J.,) instructed the jury, that if they should be of opinion from the evidence, that the horse of the plaintiff was in the stable of the defendant as a public inn-keeper, and was there killed, the plaintiff is entitled to recover damages for such loss, without proof by him that his death was the consequence of a want of care on the part of the defendant or servant, and that to prevent a recovery in such a case where it did not appear by the proof of the plaintiff, whether the horse was killed by reason of the negligence or want of proper care on the part of the defendant or his servants, or not, the defendant must make it appear to the jury that the horse was not killed by reason of the want of such care on the part of the defendant or his servants. The defendant excepted.

The appeal was argued before BUCHANAN, C. J., STEPHEN ARCHER, CHAMBERS and SPENCE, J.

By BOYLE and A. C. MAGRUDER, for the appellants, and  
By T. S. ALEXANDER, for the appellee.

STEPHEN, J. delivered the opinion of this court.

The matter in controversy in this case is of small amount, but the question involved is one of considerable importance in the administration of civil justice. It is a question of jurisdiction, and can only be decided by a careful examination of the various Acts of Assembly conferring power upon single magistrates or justices of the peace, in the recovery of small debts and other matters submitted to their judicial cognizance. The decision of such questions is not free from difficulty, on account of the multiplicity and mutability of the legislation by which our code of laws is characterised upon such subjects ;



but after the best consideration we have been able to give to the case before us, we have come to the conclusion that there was error in the judgment of the court below, and that the same ought to be reversed. Until within a recent period of our judicial history, the jurisdiction of the county court was clear and indubitable; and we do not think, that upon a fair construction of the laws enlarging the jurisdiction of justices of the peace, it has been ousted or taken away. And the opinion we have been induced to adopt, derives no inconsiderable sanction from the very marked and striking change of phraseology in which the several Acts of Assembly have been couched, that have from time to time been passed upon the subject; some of which seem to look to the fruits of the judgment or the sum recovered, and others to the matter or thing put in demand, as the test of jurisdiction. It is alone by keeping in view this distinctive feature of the laws, fixing the boundaries of jurisdiction between the courts of law, and justices of the peace, that a correct or satisfactory result can be arrived at. The act of 1791, ch. 68, gives jurisdiction to justices of the peace, where "the real debt and damages doth not exceed ten pounds, current money, or one thousand pounds of tobacco." By the act of 1809, ch. 76, the jurisdiction is given "in all cases where the real debt and damages doth not exceed the sum of fifty dollars," but the only enlargement of jurisdiction conferred by this act, is confined to the sum, and has no reference to the subject matter of the controversy, further than the amount of the sum involved in the litigation. The act expressly provides that judgment shall be given "according to the laws of the land and the equity and right of the matter, in the same manner, and under the same rules and regulations, to all intents and purposes, as such justices of the peace are now authorised and empowered to do, when the debt and damages do not exceed the sum of ten pounds, current money." Both these laws, in defining the jurisdiction, expressly and manifestly refer, not to the sum claimed or put in demand, but to the sum recovered, as the standard by which it was to be regulated. By an act passed in the year 1813, ch. 162, the sphere

of the judicial power of justices of the peace was extended to trespasses upon real property, by cutting, destroying or carrying away timber or wood from off any land, where the damage should not exceed the sum of fifty dollars. Here too it is to be remarked, that the jurisdiction is to be tested, not by the damages claimed or demanded, but by the sum recovered; the language of the act being, "where such damage doth not exceed the sum of fifty dollars," which manifestly imports the amount of the injury, actually sustained, and not the estimate which the party himself may make of it. By an act passed in 1824, ch. 138, jurisdiction is given to redress any injury to real property, for which an action of trespass *quare clausum fregit* might be maintained, where the damages claimed or laid should not exceed the sum of fifty dollars. Here, for the first time, the rule fixing the jurisdiction, is changed, from the amount recovered, by the judgment of the magistrate, to the damage as laid or claimed by the party to the suit, and the jurisdiction of the county courts is expressly taken away in all such cases. By an act passed in 1825, ch. 51, the jurisdiction of justices is extended to trespasses either to real or personal property, where the damages claimed or laid shall not exceed the sum of fifty dollars, and the power of the county courts to adjudicate or hold plea of such cases is also taken away. By the act of 1834, ch. 296, jurisdiction is given to justices of the peace in all cases where the debt or damages laid or claimed, shall not exceed the sum of fifty dollars, excepting from the operation of that act, actions of slander, assault and battery, and actions where the title to lands shall come in question. By section 10 of the act of 1791, the provisions of that act are restricted to debts or sums of money or tobacco due on contract, and to damages for the non-delivery of grain or other articles, contracted to be delivered. In that respect, no change is made by the act of 1801. By the act of 1813, jurisdiction is first given in cases of trespass, and is founded upon the sum recovered. The act of 1824 first introduces a new test of jurisdiction, by making it to depend upon the damages claimed or laid; and from that time all subsequent laws

providing for the recovery of damages, have adopted the same standard, founding the jurisdiction not upon the sum recovered, but upon the amount put in demand. If the plaintiff estimates his damages at a sum not exceeding fifty dollars, jurisdiction is given to a single magistrate, because the sum recovered cannot exceed the sum claimed; but where the nature of the injury is such as to justify a claim of damages to a larger amount in his declaration, the established jurisdiction of the county courts, existing prior to the passage of the several Acts of Assembly, is not taken away, but remains perfect and unimpaired. In cases of tort, sounding in damages, such as the one before this court, it is not perceived what other rule could well be adopted. In the language of *Judge Chase*, in *3 Dallas*, 407, "it must be acknowledged, that in actions of tort or trespass from the nature of the suits, the damages laid in the declaration afford the only practicable test of the value of the controversy;" and *Chief Justice Elsworth* in the same case says, "in an action of trespass or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion to which, from the nature of the action, we can resort in settling the question of jurisdiction." "The proposition then is simply this: where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded." In drawing the line of partition, between the jurisdiction of justices of the peace, and the county courts, the legislature of this State seem to have been governed by similar considerations, and in all cases of tort have made the jurisdiction to depend, not upon the sum recovered, but upon the damages demanded. If the injury sustained may be redressed by a sum not exceeding fifty dollars, and the plaintiff is willing to limit his right of recovery to that amount, jurisdiction is given to a justice of the peace to decide upon his case; but if he desires an indemnity, in the form of damages, to a larger amount, the county courts



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are not divested of their original jurisdiction, and remain the appropriate tribunal to afford him redress; these views are not to be considered as in any respect applicable to cases of contract, but are intended to be confined to actions of tort, where the amount of the damages are peculiarly a subject for the consideration of the jury.

After this opinion, *Alexander* for the appellee, moved the court that no judgment ought to be entered in this case, but the judgment of the county court being reversed, a writ of procedendo ought to be awarded to the county court, in order that such proceedings may be had, as would enable the appellee, the defendant below, to obtain the judgment of this court on the question reserved in the bill of exceptions, and insisted :

1. That his motion is sustained by the decision of this court in the case of *The State, use of Charlotte Hall School, vs. Greenwell, 4 Gill & John.* 419.

2. That independent of said decision, it would be necessary for the purposes of justice, that the case be sent back, in order that it may be put in a condition to enable this court to pass upon the correctness of the instruction by the court below to the jury.

BY THE COURT—

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

## ROBERT GORDON vs. JAMES M. DOWNEY.—June 1843.

By the act of 1829, ch. 51, any assignee, *bona fide* entitled to any judgment, bond, specialty or *other chose in action for the payment of money*, by assignment in writing, signed by the person authorized to make the same, may by virtue of such assignment sue and maintain an action, &c., in his name, &c., against, &c. **HELD:** that an instrument of writing which bound the defendant to pay a money rent, let a third party have a portion of the produce of the demised premises, and furnish the means of carrying it away, was not such an instrument, as under that act, would authorise an assignee to maintain an action in his own name.

The chose in action contemplated by the act of 1829, ch. 51, was one purely for the payment of money; and where the assignor if no assignment had been made, could only maintain an action for non-payment of the money.

But where money is due under such a contract, and the defendant promises the assignee to pay the same, this will enable the assignee to sue independent of the act of 1829, ch. 51, upon the express promise.

Where a verdict is rendered for the plaintiff on two counts in a declaration, one of which contains no cause of action, the court will render judgment upon the other if legally sufficient.

The act of 1809, ch. 164, declares that judgment shall not be stayed after verdict for defect of any count in a declaration, where there is one good count.

Where the plaintiff counts upon a contract assigned to him, followed by an express promise by the defendant to pay him the sum alleged to be due under it, and the bill of exceptions does not show that the plaintiff had closed the testimony on his part, it is error in the court, upon the motion of the defendant, to reject the proof of the assigned contract.

In virtue of the act of 1831, ch. 319, this court is required in appeals from certain county courts enumerated in that act, to decide upon all the bills of exception taken at the trial below, whether appealed from or not.

Where the county court awards a new trial, it has power to authorize an amendment of the pleadings under the act of 1785, ch. 80, sec. 4.

Where a verdict is set aside and a new trial awarded, the case, as far as amendments are concerned, stands as if no trial had been had.

An application for an amendment of pleadings is not a demand of a matter of right, but is an appeal to the sound discretion of the court, and to be granted when it shall appear necessary to bring the merits of the question between the parties fairly to trial.

Where an application is made to the court to withdraw a general issue plea, and file a general demurrer, and the defendant's exception to a refusal to grant that privilege did not state the existence of any necessity for such amendment, and it did not appear that the amendment if made would have given the defendant any new defence, it is not error in the county court to refuse the amendment.

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Will an appeal lie from the decision of the county court exercising its discretion, in allowing or refusing an amendment of the pleadings? Q<sup>a</sup>.

Where the county court, after verdict for the plaintiff, upon motion arrested the judgment, and there was no error in the bills of exceptions taken by the defendant, this court overruling the motion in arrest, will proceed to enter final judgment upon the verdict for the plaintiff.

#### APPEAL from *Washington* County Court.

This was an action of *trespass upon the case*, brought on the 11th November 1839, by the appellant against the appellee. The plaintiff below declared as follows, viz :

*1st Count.* That whereas, heretofore, to wit, on, &c., a certain *James Downey, senior*, entered into an agreement in writing with the said defendant, to wit, &c., whereby the said *James Downey, senior*, agreed to rent to the said defendant the farm whereon they both then resided, for one year, from the 1st day of April 1837, to the 1st day of April 1838, for the sum of three hundred dollars per year, from which sum one hundred dollars shall be deducted for paying taxes, making necessary repairs, and boarding the said *James Downey, senior*, and that the said defendant should let *Martha Gordon* have all the apples which might grow on the old trees in the orchard west of the house, which fruit the said *Martha Gordon* should remove on or before the 15th day of October in each year, so that the said defendant might pasture the ground; and they further agreed, that the said defendant should let the said *Martha Gordon* have the second crop of grass of that portion of the meadow which she had usually got, and which she shall cut when he gives her notice that he is cutting his own, and if cut at that time, the said defendant agreed and obligated himself to find horses, wagon and one hand to haul said hay; and they further agreed, that the said *James Downey, senior*, should allow sufficient timber to be cut for rails, repairs and firewood, for the use of the house, and no more, without the consent of him the said *James Downey, senior*; and afterwards the said *James Downey, senior*, and the said defendant agreed in writing, that the said agreement should be renewed for another year, to end on the 1st day of April, in the year of



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our Lord 1839, to wit, at, &c. And the said plaintiff in fact saith, that the said defendant in pursuance of the said agreement did occupy the said farm from the said 1st day of April 1837, to the 1st day of April 1839, by reason whereof, and by virtue of the said agreement in writing, the said defendant became indebted to the said *James Downey, senior*, in the sum of four hundred dollars, that is to say, the sum of two hundred dollars for the year ending on the 1st day of April 1838, and the further sum of two hundred dollars for the year ending on the 1st day of April in the year next following, to wit, 1839; and whereas the said *James Downey, senior*, before any part of the said sum of money due for the first said year, had been paid by the said defendant, and before the said sum of two hundred dollars for the second year had become due, and before any part thereof had been paid by the said defendant, to wit, on the 27th day of October 1838, to wit, at the county aforesaid, assigned the said written agreement to one *Martha Gordon*, by an assignment in writing, on the said agreement signed by him, the said *James Downey, senior*, which assignment was and is in substance and effect as follows, that is to say, whereas I am now boarding with my daughter, *Martha Gordon*, I do hereby assign unto the said *Martha Gordon*, all my right, title, claim and interest, in and to the within, and all money due thereon, or that may hereafter become due, as compensation for my boarding and the trouble she may have in attending to and taking care of me. Witness my hand, October 27th, A. D. 1838; and the said *James Downey, senior*, thereunto subscribed his name, and then and there delivered the said agreement, in writing, with the assignment thereon, to the said *Martha Gordon*, to wit, &c.; of which said assignment the said defendant then and there had notice; and whereas, the said *Martha Gordon* afterwards, and before any part of the said sum of two hundred dollars, due for the first of the said year's rent, had been paid by the said defendant, and before the said sum of two hundred dollars, to be paid for the second year's rent, had become due, and before any part thereof had been paid by the said defendant, to wit, on the 29th day of

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March 1839, to wit, at, &c., assigned the said agreement, in writing, to the said plaintiff, by an assignment in writing, on the said agreement, signed by her the said *Martha Gordon*, which said assignment is in substance and effect as follows, that is to say, I hereby assign and set over all my right, title, interest, claim, property and demand, to the within article of agreement, unto *Robert Gordon*, at my risk, for value received. Witness my hand and seal, this 29th day of March 1839, and and thereunto signed her name, and affixed her seal, to wit, at, &c., and then and there delivered the said agreement, with the said several assignments thereon, to the said plaintiff, of which said assignment the said defendant then and there had notice. By virtue of which said several assignments, and by virtue of the Act of Assembly in such case made and provided, the said defendant became indebted to the said plaintiff in the said sum of four hundred dollars, in pursuance of the terms of the said agreement, and the said plaintiff became entitled to have and demand the same, that is to say, \$200 for the year ending the 1st day of April 1838, and the further sum of \$200 for the year ending on the 1st day of April then next following; *and the said defendant being so indebted to the plaintiff, afterwards, to wit, &c., in consideration thereof, undertook and then and there faithfully promised the said plaintiff the said sum of four hundred dollars, according to the terms of said agreement, whenever he should be thereunto requested.*

*2nd Count.* And whereas, afterwards, to wit, on, &c., at, &c., the said defendant was indebted unto a certain *James Downey, senior*, in another sum of \$400, for the use and occupation of a certain messuage, tenement, farm and land, with the appurtenances, of the said *James Downey, senior*, by the said defendant, and at his special instance and request, and by the sufferance and permission of the said *James Downey, senior*, for a long time before then elapsed, had held, used, occupied and enjoyed, which said debt of \$400 was evidenced by the written promise of the said defendant, signed by the said defendant, to pay the said sum of money to the said *James Downey, senior*, when the same became due, to wit, on, &c., at,

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&c.; and whereas, afterwards, to wit, on, &c., &c., the said *James Downey, senior*, assigned, by an assignment in writing, signed by him the said *James Downey, senior*, the said written promise of the said defendant, and the said debt thereby evidenced to one *Martha Gordon*, for value received, of which said assignment the defendant then and there had notice; and whereas, afterwards, to wit, on, &c., at, &c., the said *Martha Gordon* assigned, by an assignment in writing, signed by her the said *Martha Gordon*, the said written promise of the said defendant, and the said debt or sum of four hundred dollars, thereby evidenced to the said plaintiff, then and there delivered the said written promise, with the said several assignments thereon to the said plaintiff: By reason whereof, and by virtue of the Act of Assembly in such case made and provided, the said defendant became indebted to the said plaintiff, in the said sum of four hundred dollars, as evidenced by the said written promise, *and being so indebted, he the said defendant then and there undertook and faithfully promised the said plaintiff, to pay him the said sum of four hundred dollars, whenever he should be thereunto afterwards requested.*

*3rd Count.* And whereas, also, afterwards, to wit, on, &c., at, &c., by a certain agreement, then and there made, between the said defendant and a certain *James Downey, senior*, it was agreed, that for the consideration in said agreement thereafter mentioned, the said *James Downey, senior*, did rent to the said defendant the farm whereon they the said *James Downey, senior*, and the said defendant then resided, the same being the farm of the said *James Downey, senior*, from the 1st day of April 1837, for one year thence next ensuing, for the sum of three hundred dollars for said year, from which sum, one hundred dollars was to be deducted for paying taxes, making necessary repairs, and boarding the said *James Downey, senior*, the said defendant to let *Martha Gordon* have all the apples on the old trees in the orchard west of the house, which fruit the said *Martha Gordon* was to remove on or before the fifteenth day of October, in the year aforesaid, so that the said defendant could pasture the ground; the said defendant to let the said



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*Martha* have the second crop of grass of that portion of meadow which she usually got, which she was to cut at that time; the said defendant obligated himself to find horses, wagon and one hand to haul said hay; the said *James Downey, senior*, to allow sufficient timber for rails, repairs and firewood, for the use of the house, and no more, without his consent. And the said plaintiff in fact saith, that after the making of the said promise and agreement on the part of said defendant, he the said defendant used, possessed, occupied and enjoyed the said farm, in pursuance of said agreement, for the said term of one year from the said 1st day of April 1837, to the 1st day of April 1838, whereby he became liable to pay to the said *James Downey, senior*, by virtue of his said promise and assumption, the said sum of two hundred dollars, current money, for the said occupation, possession and use of said farm, and being so liable, he the said defendant, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay the same whenever he should be requested. And the said plaintiff further in fact saith, that afterwards, and before the expiration of the said lease for one year as aforesaid, to wit, at, &c., the said *James Downey, senior*, and the said defendant, agreed in writing, that the said agreement herein before set forth, should be renewed and continued for one year more, to end on the 1st day of April 1839; and the said plaintiff further saith, that in pursuance of said agreement, so renewed and continued as aforesaid, the said defendant continued to possess, occupy and enjoy the said farm, for the term of one more year, ending on the 1st day of April 1839, whereby he became liable to pay to the said *James Downey, senior*, the said further sum of two hundred dollars, for the said use, enjoyment and possession of said farm, from the said 1st day of April 1838, to the 1st day of April 1839, according to his promise and assumption aforesaid, to wit, at the county aforesaid, and being so liable, he the said defendant then and there undertook and faithfully promised to pay the same accordingly. And the said plaintiff further saith, that before any part of the said sum of money, due for the first year as aforesaid, had been paid by the said de-

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defendant, and before the said sum of two hundred dollars for the second year aforesaid, had become due, and before any part thereof had been paid by the said defendant, to wit, on the 27th day of October 1838, at the county aforesaid, the said *James Downey, senior*, for a full and valuable consideration, paid to him by *Martha Gordon*, by his assignment in writing, his name being thereto signed, did assign and transfer the said written agreement to the said *Martha Gordon*, and all his right, title and interest therein and to the said money, due and to become due thereon, from the said defendant to him the said *James Downey, senior*, and then and there delivered the said agreement in writing, with his said assignment thereon, to the said *Martha*, to wit, at the county aforesaid; of which said assignment the said defendant then and there had notice. And the said plaintiff further saith, that the said *Martha*, afterwards, and before any part of the said sum of four hundred dollars, due as aforesaid, had been paid by the said defendant, to wit, on the 29th day of March 1839, at the county aforesaid, did assign and transfer in writing to the said plaintiff, by an assignment in writing, under the seal of said *Martha*, on the said agreement signed by the said *Martha*, all her the said *Martha's* said interest, right, title, claim, property and demand to the said article of agreement, and the rent due on the same as aforesaid, and then and there delivered the said agreement, with the said assignments thereon written, to the said plaintiff, of which last said assignment the said defendant then and there had notice. *By virtue of which said several assignments, and by virtue of the Act of Assembly in such case made and provided, the said defendant became indebted to the said plaintiff in the said sum of four hundred dollars, in pursuance and in virtue of the said promises and agreements, and the terms thereof, and the said plaintiff became entitled to have and demand the same; yet, &c.*

The defendant pleaded that he did not undertake and promise in manner and form as the said *Robert Gordon* hath above thereof complained against him, and of this he puts himself upon the country, &c.

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At the trial of this issue the jury found a verdict for the plaintiff for \$459.80 damages, which the court set aside, and awarded a new venire. At the second trial the jury again found for the plaintiff on the first and third counts of the nar, damages \$382.

The defendant moved the court to arrest the judgment, and assigned the following reasons:

1. That the instrument described and set out in the *first* and *third* counts of the plaintiffs declaration, being an agreement containing various stipulations on both sides, besides the undertaking for the payment of money, is not an instrument upon which the assignee can bring suit in his own name, within the meaning of the Act of Assembly in such case made and provided.

2. That there is not in the case set out in either the *first* or *third* count of the declaration, any written contract for the reservation of rent for the period, for the rent of which this suit is brought, that is to say, from the 1st of April 1837, to the 1st of April 1839.

3. That if there be such a written contract, there is in point of fact no assignment of it, as in the case of the plaintiff is set forth in either of said counts.

4. That the said *first* and *third* counts are in other respects erroneous, defective and insufficient.

The county court *being divided* in their opinion on the motion of the aforesaid *James M. Downey*, by his attorney aforesaid, for an arrest of judgment on the *first* reason assigned, the same was accordingly arrested.

The county court being unanimous in their opinion as to the remaining reasons, the same *were overruled* by the court here.

1ST EXCEPTION. At the trial of this cause, the defendant prayed the court for leave to withdraw his plea and to file a general demurrer to the *first* and *third* counts of the declaration, but the court, (BUCHANAN, C. J., and T. BUCHANAN, A. J.) inasmuch as there had been a new trial at the instance of the defendant, refused permission to amend, and decided that the defendant should proceed to trial upon the issue as it



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stood when the new trial was granted. The defendant excepted.

2ND EXCEPTION. The plaintiff to support the issue on his part joined in this case, offered in evidence the following agreement, to wit:

This indenture made this 8th of January 1836, between *James Downey, senior*, and *James M. Downey*, both of *Washington township, Franklin county and State of Pennsylvania*, witnesseth, that for the consideration hereinafter mentioned, the said *James Downey, senior*, doth rent to the said *James M. Downey*, the farm whereon they now reside, from the 1st of April 1835, for the term of two years, for the sum of three hundred dollars per year, from which sum one hundred dollars shall be deducted for paying taxes, making necessary repairs and boarding said *James Downey, senior*. The said *James M. Downey* shall let *Martha Gordon* have all the apples that grow on the old trees in the orchard west of the house, which fruit the said *Martha Gordon* shall remove on or before the 15th of October in each year, so that the said *James M. Downey* can pasture the ground. The said *James M. Downey* shall let the said *Martha Gordon* have the second crop of grass of that portion of the meadow that she usually gets, which she shall cut when he gives her notice that he is cutting his own, and if cut at that time said *James M. Downey* doth obligate himself to find horses, wagon and one hand to haul said hay. Witness our hands and seals the day and year above mentioned.

JAMES DOWNEY, SEN'R, (SEAL.)

JAMES M. DOWNEY, (SEAL.)

A supplement to the above articles and they renewed for another year, the said *James Downey, senior*, doth allow sufficient timber for rails, repairs and firewood for the use of the house and no more, without his consent, made and agreed to this 13th day of January, 1837.

JAMES DOWNEY, SEN'R.

JAMES M. DOWNEY.

The above articles renewed for another term, to end on the 1st of April 1839.

JAMES DOWNEY, SEN'R.

JAMES M. DOWNEY.

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On the back of the foregoing agreement are the following endorsements, to wit: Received the rent in full for the year, from the 1st of April 1835, to the 1st of April 1836. Witness my hand this 5th day of August, 1836.

JAMES DOWNEY, SR.

Received satisfaction in full for the rent of the year from the 1st April 1836, to the 1st April 1837. Witness my hand this 17th day April, 1838.

JAMES DOWNEY, SEN'R.

Whereas I am now boarding with my daughter, *Martha Gordon*, I do hereby assign unto the said *Martha Gordon* all my right, title, claim and interest in and to the within article of agreement, and all money due thereon or that may hereafter become due as compensation for my boarding, and the trouble she may have in attending to and taking care of me. Witness my hand October 27th A. D. 1838.

JAMES DOWNEY, SEN'R.

Witness,—*John Flanagan, James Mayhugh.*

I hereby assign and set over all my right, title, claim, interest, property and demand, to the article of agreement, unto *Robert Gordon*, at my risk, for value received. Witness my hand and seal this 29th day of March, 1839.

MARTHA GORDON, (L. S.)

The plaintiff also offered in evidence the several receipts endorsed upon the same for the payment of the rent due on said agreement up to the 1st day of April, 1837, which were admitted by the defendant. The plaintiff further offered in evidence the supplement to and renewal for another year of the said agreement, endorsed upon the same, and signed by the said *James Downey, senior*, and the defendant, dated 13th January 1837, and also the other renewal endorsed thereupon, without date, whereby the said agreement was renewed for another term to end upon the 1st April 1839, and signed by said parties in like manner, the execution of both which renewals was admitted. The plaintiff also offered in evidence the assignment of said agreement from the said *James Downey, senior*, to *Martha Gordon*, endorsed thereupon and dated 27th October 1838, and also the assignment thereof from the said *Martha Gordon* to the plaintiff, endorsed upon the said

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agreement and dated 29th day of March, 1839, the due execution of both which assignments was admitted. The plaintiff further offered by competent testimony, that the defendant occupied and enjoyed the property mentioned in said agreement from the 1st day of April, 1835, to the 1st day of April, 1839. Whereupon the defendant by his counsel prayed the court to instruct the jury, that the said agreement being a contract *inter partes* in which various things are stipulated to be done and performed on both sides, and not a mere chose in action for the payment only of money, the same was not an instrument on which the assignee could bring suit in his own name, and therefore the said agreement was not admissible evidence under the *second* count in the plaintiff's declaration; and the court (BUCHANAN, C. J., and T. BUCHANAN, A. J.) being divided in opinion on the subject matter of said prayer, the plaintiff was not permitted to read said agreement in evidence under the said *second* count. The plaintiff excepted.

The judgment being arrested on the verdict, the plaintiff below appealed to this court.

The cause was argued before STEPHEN, ARCHER, DORSEY and CHAMBERS, J.

By J. DIXON ROMAM for the appellant, and

By R. JOHNSON for the appellee.

DORSEY, J., delivered the opinion of this court.

We think the county court erred in arresting the judgment on the verdict rendered in this case, notwithstanding, it is our opinion, that the *chose in action*, assigned in this case, is not such a *chose in action* as would, under the act of 1829, ch. 51, entitle the assignee, standing upon the assignment only, to the maintenance of an action in his own name. It was not the intention of the legislature to confer on the assignee any such power, except in cases where the chose in action was purely "for the payment of money," and where the only action which, from the nature and stipulations of the *chose in action* assigned, the assignor could have maintained, if no assignment had been



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made, was that for the payment of the money due on the contract. It never was intended that the assignor should transfer to the assignee a complete right of action, to be prosecuted in his own name, and at the same time retain in himself, under the same chose in action, a power to sue for the breach of stipulations, not for the payment of money. But in the *first* count in the declaration filed in this case, there is an allegation that the defendant, after the assignment, and after the money became due, promised to pay it to the plaintiff, which promise would authorise him to sue for it, as he has done, whether the assignment be legal or equitable, and whether the act of 1829 had ever passed or not. The verdict, it is true, was rendered by the jury on the first and third counts in the plaintiff's declaration; the latter of which contains no such promise to pay. But by the second section of the act of 1809, ch. 164, it is enacted, "that where any verdict shall be given in any action, suit or demand, in any court of record of this State, the judgment thereupon shall not be stayed or reversed for any defect of form or substance in any writ, original or judicial, or for any variance in such writ from the declarations or other proceedings, nor for defects in any count in the declaration, so that there be one good count."

The county court erred in withdrawing from the jury, under the *second* count in the declaration, the agreement between *James M. Downey* and *James Downey, senior*, that count having charged a promise of payment by the defendant to the plaintiff, as having been made after the assignments in evidence before the jury. And for aught that appears to us, but for such withdrawment, the promise, as laid, might have been proved. The bill of exceptions does not state or show that the plaintiff had closed the testimony on his part.

In virtue of the act of 1831, ch. 319, this court are required in appeals from all the counties therein enumerated, (of which *Washington* county is one,) to decide upon all the bills of exceptions, taken at the trials below, whether appealed from or not. It becomes our duty, therefore, to inquire whether the county court were right in refusing the application of the

defendant, to withdraw the general issue and put in a general demurrer to the plaintiff's declaration.

On behalf of the appellant it has been insisted, that on awarding a new trial, no amendment of the pleadings can be allowed, at the instance of the party on whose application the new trial was granted, no matter with what urgency the appeals of justice might demand it. For this broad proposition no authority has been cited; and we do not think it consistent with the 4th section of the act of 1785, ch. 80, which declares, "that the courts of law shall have full power and authority to order and allow amendments to be made in all proceedings whatsoever, before verdict, so as to bring the merits of the question between the parties fairly to trial; and if amendment is made after the jury is sworn, a juror shall be withdrawn." When the verdict is set aside, and a new trial awarded, the case, as far as amendments are concerned, stands as if no trial had ever been had. But an application for an amendment of pleadings, is not a demand of a matter of right, but is an appeal to the sound judicial discretion of the court, and to be granted when it shall appear necessary to bring the merits of the question, between the parties, fairly to trial. In this case there was nothing to shew the existence of such necessity, or that the amendment if made, would have given the defendant any defence to the action, to which he would not have been entitled in the condition in which the pleadings then stood. Conceding, then, the affirmative of the proposition, (on which we mean to express no opinion,) whether an appeal will lie, from the decision of a court exercising its discretion in allowing or refusing an amendment of the pleadings, we think the refusal to permit the defendant to make the amendment asked for, was no ground for a bill of exceptions or an appeal, the defendant having sustained no injury from the decision of the county court, of which he complains.

Dissenting from the course pursued by the county court, as stated in the bills of exceptions of both appellant and appellee, and also dissenting from its decision on the motion in arrest, we reverse its judgment.

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State vs. Nutwell.—1843.

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## THE STATE OF MARYLAND vs. JOHN S. E. NUTWELL.

June 1843.

Certainty to a reasonable extent, is an essential attribute of all pleadings, both civil and criminal, but is more especially so in the latter, where conviction is followed by penal consequences.

One of the objects of certainty in pleading is notice to the party of the nature of the charge against which he is to come prepared to defend himself ; another to enable the court to pronounce the sentence of the law, and the party to defend himself against a second prosecution for the same crime, by pleading a prior acquittal or conviction.

An indictment under the act of 1817, ch. 227, section 1, should allege the names of the slave and his master if known ; if unknown, the fact should be so averred ; and also, that there was no license in existence authorizing the slave to remain in the retailer's store, &c., within the period prohibited by the said act. It is not a compliance with the act merely to allege the slave not having a written order or license from his master. The non-existence of a license is an essential ingredient in the offence.

WRIT OF ERROR to *Anne Arundel* County Court.

This was an *Indictment*, in the following words:

STATE OF MARYLAND, all that part of *Anne Arundel* county not included within the limits of *Howard District of Anne Arundel county*, to wit: The grand jurors of the *State of Maryland* for all that part of *Anne Arundel* county not included within the limits of *Howard District of Anne Arundel county*, upon their oath do present, that *John S. E. Nutwell*, late of all that part of *Anne Arundel* county not included within the limits of *Howard District* of said county, yeoman, on the 28th day of February, in the year one thousand eight hundred and forty-two, the said *John* being then and there a licensed retailer, did suffer a slave to be in his store-house, in which said house the said *John*, on the day and year aforesaid, at all that part of *Anne Arundel* county not included within the limits of *Howard District* of the county aforesaid, was accustomed to sell distilled liquor between sun-set in the evening of the same day and sun-rise of the succeeding morning, the said slave then and there not having a written order or license for that purpose from his master, against the Act of Assembly in such



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case made and provided, and against the peace, government, and dignity of the state.

JAMES BOYLE, *Deputy Attorney General*  
*Of the State of Maryland for said county.*

The traverser pleaded not guilty; but the verdict being against him he moved in arrest of judgment.

1. Because the indictment does not name the owner of the slave whom it is alleged was permitted by the traverser to be in his store-house.

2. Because the indictment is in other respects defective, informal and insufficient, so that no judgment can be rendered thereon.

The county court arrested the judgment, and the State sued out a writ of error from the Court of Chancery.

By the act of 1817, ch. 227, sec. 1, it is enacted, that it shall not be lawful for any licensed retailer or retailers, in *Calvert* county, &c., or for any person or persons residing in either of those counties, accustomed to make and sell distilled spirits or other liquors, to suffer any free negro or mulatto, or any negro or mulatto servant or slave to be in her or their store-house, or other house, wherein he, she or they may be accustomed to sell distilled spirits or other liquors between sunset in the evening and sun-rise of the succeeding morning: *Provided always*, that nothing herein contained shall be construed to extend to the case of such aforesaid servant or slave, as shall have a written order or license for that purpose from his master, mistress, overseer or other person in whose employment he may actually be, with the consent of his owner or owners.

The 2nd section provides for recovery of penalty by indictment.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, CHAMBERS and SPENCE, J.

By BOYLE, D. A. G., for the State, and

By ALEXANDER, for the defendant in error.

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State *vs.* Nutwell.—1843.

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STEPHEN, J. delivered the opinion of this court.

We think that the judgment of the court below in this case was correct, and ought to be affirmed. Certainty to a reasonable extent, is an essential attribute of all pleading, both civil and criminal, but is more especially necessary in the latter, where conviction is followed by penal consequences. One of its objects is notice to the party of the nature of the charge, against which he is to come prepared to defend himself; and it is also necessary, not only that the offence may be displayed upon the record, so as to enable the court to pronounce the sentence of the law, but to enable the party to defend himself against a second prosecution for the same crime, by pleading a prior acquittal or conviction. In the case now before this court, the indictment, we think, is defective, in omitting the name of the slave and that of the master, if known, if not known, the fact should have been so stated in the indictment. Such an averment in the indictment was requisite, not only to inform the accused of the charge alleged against him, so as to prepare for his defence, but to prevent a second punishment for the same offence, by pleading in bar a former acquittal or conviction. The omission to exclude a license by the necessary averment of a want of one, was also a fatal defect; the non-existence of a license being an essential ingredient in the constitution of the offence, according to the true and sound construction of the Act of Assembly, upon which the prosecution was founded. In other respects, the allegations as to time and place may be sufficient, being conformable to the language of the act, which is rather carelessly drawn; but in that respect, it would be advisable in all future cases, to make the necessary averments, with greater precision and certainty. The judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

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Longwell and Ege vs. Ridinger.—1843.

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JOHN K. LONGWELL AND ANDREW G. EGE, ADMINISTRATORS  
OF JOHN MCCALED, vs. CATHARINE RIDINGER, ADMINIS-  
TRATRIX OF PETER RIDINGER.—*June 1843.*

Where the administrator of a deceased tenant continues the tenancy of his intestate until after the death of the landlord, the owner of the fee, the rent due up to the last day of payment prior to the landlord's decease, might have been distrained for by him, and is therefore a preferred claim upon the assets of the deceased tenant found upon the demised premises, under the act of 1836, ch. 192.

Where the landlord resorts to a distress to recover rent, he is not entitled to interest on the sum in arrear.

For rent due and payable at the landlord's death, his administrator may claim a preference to be paid out of the assets of his deceased tenant, where the claim conforms to the act of 1836, ch. 192.

The remedy by distress for rent in arrear is not within the act of limitations.

#### APPEAL from the *Orphans Court of Carroll County.*

On the 20th March 1843, the appellants filed their petition, alleging, that on the 10th May 1842, *Peter Ridinger* died intestate, and that the appellee is his administratrix; that their intestate died on the 2nd January 1843; that *McCaleb* demised to *Ridinger* on the 1st April 1835, a certain messuage and premises lying in said county, for the term of *three* years, to commence from that day, and after the end of said *three* years, from year to year, that is to say, that the lease was to continue from year to year, so long as the said parties could agree, and until the one or the other party gave the other party due and legal notice that the lease should determine; that *Ridinger* agreed to pay the yearly rent of one hundred dollars, payable half yearly; that he entered and was possessed until his death, when the sum of \$498 of the rent aforesaid, for the space of seven years ending on the 1st April 1842, had become due and was unpaid, and is still in arrear; that said *Ridinger* resided on the premises at the time of his death, at which time and long afterwards, his principal personal property to the value of \$1,000, consisting, &c., was being and remaining on the premises, subject to being distrained for said rent, and for which a distress by law might have been made; that the said *Catharine*, admin-



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Longwell and Ege vs. Ridinger.—1843.

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istratrix as aforesaid, has continued upon said demised premises up to this time; that half a year's rent became due on the 1st October last, and another half year's rent will be due on the 1st April next; that there is at this time a large quantity of growing grain on the said premises, liable by law to be distrained for the said rent, and that the petitioners claims have a preference over all other claims against said deceased's estate. Prayer, that the administratrix pay the said claim in full and in preference over all other claims, and for other relief, citation, &c.

The account filed with the petition, (exhibit A,) charged the rent as follows:

"PETER RIDINGER to <i>John McCaleb</i> ,	DR.
1st October, 1835. To $\frac{1}{2}$ year's rent of farm from 1st April	
last till date, - - - - -	\$50
To 7 years interest on the same,	21

The account was so made up from 6 months to 6 months, until October 1842, and amounted to \$907.50, giving various credits with interest thereon, \$358.14. It was submitted with an affidavit in the usual form to the orphans court, who endorsed it as follows:

10th October 1842. The foregoing account will pass when paid. The orphans court being satisfied of the justice of the claim.

Test, J. B., Register, &c.

The petition was then amended and the lease produced, by which it appeared that *Ridinger* agreed to pay *McCaleb*, or to his heirs, the reserved rent, &c. The inventory of the personal estate of the deceased *Ridinger* was also exhibited.

The answer of the appellee did not admit to be true any of the facts mentioned in the petition of the appellants, but put them to proof thereof, nor the accuracy of the account to which she pleaded the statute of limitations, and also denied that this claim was entitled to any preference.

The petitioners then prayed the court to direct plenary proceedings to be taken in the cause, which was done.

On the 17th April 1843, the orphans court decreed that the appellee should pay the appellants the sum of fifty dollars, be-

ing the amount of rent due for the premises, which accrued from the 1st April 1842 to the 1st October 1842, with the interest thereon, the said sum being in the opinion of this court a claim against the estate of the said *Peter Ridinger*, for which a distress might be levied, and being justly due to said estate of said *John McCaleb*, and for which this court will allow the said administratrix of the said *Peter* in full as for a preferred claim, and that she pay all costs, &c.

The administrators of *McCaleb* appealed to this court.

By the act of 1836, ch. 192, it is enacted, that from and after the 1st day of May next, all claims for rent in arrear against deceased persons, for which a distress may be levied by law, after the death of the deceased, shall have preference over all other claims against said deceased's estate, except such as now have a preference over claims for rent in arrear, without the levying of a distress therefor, and the administrator or executor of any deceased person is authorised to pay and discharge such claim for rent in arrear, provided the orphans court of the county shall be satisfied of the justice of said claim, and that a distress therefor might be levied on said deceased's goods and chattels, in the hands of such administrator or executor; and provided also, that nothing in this act contained shall be construed to divest or in any manner impair the right of any person having a claim for rent in arrear against a deceased person, to pursue his remedy therefor by distress in the cases, and in the manner now allowed by law.

SEC. 2. And be it enacted, that the orphans court, before passing or allowing any such claim in the settlement of the accounts of an administrator or executor, shall be satisfied, on proof of the correctness of the claim, and that a distress could be levied and maintained therefor, but nothing in this act contained shall be construed to compel an administrator or executor to pay any such claim, although passed by the orphans court, if he shall think proper to dispute said claim.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS and SPENCE, J.

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Mulliken vs. Boyce.—1843

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By RAYMOND for the appellants, and  
By MAULSBY for the appellee.

By THE COURT—

This court is of opinion that the rent in arrear due from *Peter Ridinger* to *John McCaleb* on the 1st day of October 1842, could have been distrained for by the said *McCaleb*, who died on the 2nd January 1843, the administratrix of the said *Peter Ridinger* having continued the tenancy of her intestate up to the time of, and after the death of the said *McCaleb*, the landlord and owner of the fee of the said demised premises. It is therefore further ordered, adjudged and decreed, that the claim of the said appellants to and for the sum of \$457.16, under and in conformity to the act of 1836, ch. 192, be and the same is hereby approved and passed, as having a preference over all other claims against the said *Peter Ridinger's* estate, except such as are excepted by the said act of 1836, and that the said appellee be and he is hereby authorised to pay the same to the said appellants.

DECREE REVERSED WITH COSTS.

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*December Term, 1843.*

JAMES MULLIKEN vs. THEODORE R. S. BOYCE.—*December*  
1843.

The plaintiff, upon the sale of a horse by him, promised the defendant, the purchaser, to obtain a certificate from the breeder, that the animal was thorough bred, and send it to him. In an action to recover the amount of a note given for the purchase money, the defendant prayed the court to instruct the jury that the plaintiff could not recover, unless the jury should find, that the horse was thorough bred, which the court refused, and instructed the jury that the plaintiff could not recover unless he furnished the promised certificate within a reasonable time from the making of the contract. This was affirmed upon appeal.

Upon the sale of a horse, the seller agreed to furnish the buyer with a breeder's certificate that the horse was thorough bred. The latter accepted the animal, and retained him without any offer to return him. In an action upon a note for the purchase money, though the plaintiff had failed to fur-



## Mulliken vs. Boyce.—1843.

nish the promised certificate, he may still recover the actual value of the horse sold.

Where a defendant is not prejudiced by the erroneous instruction of the court below, or where such an instruction is beneficial to him, this court, upon his appeal, will not therefor, reverse the judgment.

A promise by the vendor of a horse to furnish a breeder's certificate that the animal was thorough bred, does not authorise the defendant in an action against him for the purchase money, to introduce the opinion of a witness who had seen its pedigree as forwarded by the plaintiff to the defendant, that he did not consider it thorough bred, as evidence to the jury, without producing the paper which contained it.

A witness is not competent to speak of the contents of a paper writing or document without producing it.

Where a defendant lived with the witness, and kept papers at his house, and had also a plantation and house to which he frequently went, and where the witness had seen papers which he supposes belonged to defendant, an unsuccessful search for a paper alleged to be left at the house of the witness, and no search any where else, is not sufficient to let in secondary evidence of the contents of the paper as a lost paper.

### APPEAL from Prince George's County Court.

This was an action of *Assumpsit*, brought on the 2nd March 1840, by the appellee against the appellant, to recover the amount of a promissory note of the defendant for \$350, dated 28th September 1837, payable to the appellee or order. The declaration also contained the common money counts. The defendant pleaded non-assumpsit, and the jury found a verdict against him for \$445.37, on which judgment was rendered.

1ST EXCEPTION. At the trial of this cause, the plaintiff to support the issue on his part joined, offered in evidence to the jury the following promissory note, which was admitted to be in the handwriting of the defendant, which is as follows:

UPPER MARLBOROUGH, 28th Sept. 1837.

\$350. Two years after date, I promise to pay *T. R. S. Boyce*, or order, three hundred and fifty dollars, for value received, with interest, payable at the *Bank of Baltimore*.

JAMES MULLIKEN.

The defendant to support the issue on his part joined, then proved to the jury by *William D. Bowie*, a competent witness, that he was present when the contract was made, for which the said note was given, and that said note was given for the

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Mulliken vs. Boyce.—1843.

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purchase money of a brown mare, sold and delivered by plaintiff to defendant, who kept possession thereof until the mare died; that the said plaintiff sold the said mare, and the defendant purchased the same on the express stipulation and condition on the part of the plaintiff *that she was a thorough bred animal*, and that the plaintiff promised to furnish to the defendant a certificate *to that effect from the breeder, a Mr. A. S. Allen, of Virginia*, and at the time of said sale, gave to the defendant a short memorandum of her pedigree, which said memorandum he declared contained her true pedigree, but it was declared unsatisfactory at the time by the defendant, on the ground that it did not *trace the pedigree of said mare far enough*, and that it was not the breeder's certificate; and thereupon the plaintiff assured the defendant that he would obtain a certificate that the said mare was thorough bred, from the breeder, a *Mr. A. S. Allen of Virginia*, and send the same to defendant, and defendant agreed to receive such certificate as evidence of that fact, on which assurance being given, the defendant then executed the said note, on which this suit is brought. The defendant then proved by the same witness, that about eighteen months afterwards, the defendant called on the plaintiff in *Baltimore*, for the pedigree of said mare, and demanded the certificate from the breeder, of her being a thorough bred animal, and that the said certificate was not furnished by the plaintiff at that time, but the plaintiff promised to furnish it at some future time, which defendant agreed to. The plaintiff then proved by the said witness, that some eight months, or a year afterwards, and before the commencement of this suit, a paper purporting to be *a certificate of pedigree of said mare, from Mr. A. S. Allen, the breeder of said mare*, was enclosed in a letter from the plaintiff to the defendant, through the mail, and that said paper was received by the defendant. The defendant then proved, that the said paper, purporting to be a certificate of the pedigree of said mare, was objected to by him to the witness at the time of its reception, but the plaintiff was not present, on the ground that it was not a certificate of the said mare's being a thorough bred animal. Upon the

foregoing evidence the defendant prayed the court to instruct the jury, that it was incumbent on the plaintiff before he could recover in this action, to prove that the said mare was a thorough bred animal, and that unless they find from the evidence that the said mare was a thorough bred mare, that then they must find a verdict for the defendant, but the court (STEPHEN, C. J., and KEY, A. J.) refused to grant the said prayer, but were of opinion and so instructed the jury, that if the jury find from the evidence in the cause that the note on which this action is brought, was passed by defendant for a mare represented by plaintiff to be thorough bred, and that plaintiff agreed to furnish defendant a certificate of her being thorough bred, as evidence of that fact, then the plaintiff cannot recover, unless he shews a compliance with the contract, by having furnished such a certificate within reasonable time from the time of the contract; to which opinion of the court refusing to grant the defendants's prayer as asked for, and to their opinion as given, the defendant excepted.

2ND EXCEPTION. At the trial of this cause, after the evidence had been given, which is contained in the first bill of exceptions, which by agreement is made a part of this bill of exceptions, the defendant offered to prove by *William D. Bowie*, a competent witness, that the sum of \$350, the amount of the note on which this suit was brought, was agreed to be paid by the defendant to the plaintiff, in consideration of her being sold as a thorough bred mare, and that said sum was more by \$250, than the value of said mare, if she had been sold as a common or cold blooded mare, or any other common mare of her appearance and size, and then asked the said witness whether he had ever seen the pedigree of said mare, and from his knowledge of the pedigree of said mare, he considered her to be a thorough bred animal, but the counsel for the plaintiff objected to the said witness answering said question, unless the defendant would produce the certificate of pedigree of said mare, and the court sustained the objection of plaintiff's counsel, and refused to permit the said witness to answer the said question; to which opinion of the court, and to their refusal as aforesaid, the defendant excepted.



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Mulliken vs. Boyce.—1842.

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3RD EXCEPTION. At the trial of this cause, and after the court had given the opinion expressed in the second bill of exceptions, which by agreement is incorporated with and made a part of this bill of exceptions, *the defendant, for the purpose of letting in secondary proof of the contents of said certificate of pedigree*, proved to the court by the testimony of *William D. Bowie*, a competent witness, that the certificate of the pedigree of said mare, which was furnished by the said plaintiff to the defendant, in the manner and at the time stated in the preceding bills of exceptions, was at one time in the possession of the witness, and its contents were read by him; that he returned said certificate to the said defendant, who at the time lived with the said witness, although said defendant owned a plantation and house, to which he frequently went, and where witness has seen papers which he supposes belonged to defendant; that said witness has himself looked for the said certificate of pedigree, and has not been able to find it, and that he has seen the defendant look among the papers at witness' house in a drawer where the said defendant usually kept such of his papers as were of much importance, and that the said certificate of pedigree was not found by the said defendant. Witness further stated, that he had no knowledge of any search made in any other place by the said defendant, and that the said witness does not know that said defendant had papers at his own plantation house, nor does he know that said defendant ever made any search for said certificate of pedigree at the latter place; but the court rejected the said evidence, so as aforesaid offered, and were of opinion that the said evidence was not legally sufficient to warrant the introduction of any secondary or parol proof of the contents of said certificate of pedigree; to which opinion of the court, and their refusal to suffer any parol proof to go to the jury of the contents of said certificate of pedigree, the defendant excepted.

The defendant appealed to this court.

The cause was argued before ARCHER, DORSEY and CHAMBERS, J.

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Mulliken *vs.* Boyce.—1843.

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By T. F. BOWIE for the appellants, and  
By W. H. TUCK for the appellee.

ARCHER, J., delivered the opinion of this court.

By the contract between the parties, the representation of the plaintiff was gratified by the adduction of the breeder's certificate that the mare was thorough bred. The prayer, therefore, of the defendant, which called upon the court to say that the plaintiff could not recover unless the jury believed the mare was thorough bred, could not be gratified; the plaintiff being entitled to recover the full amount of the note, if the jury should believe the plaintiff had produced the breeder's certificate, according to the terms of the contract. The prayer was wrong in another respect; for had the plaintiff failed to comply with his representation, he would still have been entitled to recover the value of the mare actually sold, as an animal not thorough bred.

In the instruction given by the court, the only error we perceive, is in their instructing the jury that the plaintiff could alone recover, upon the production of the breeder's certificate. If the plaintiff failed to produce evidence of this, still he was entitled to recover the value of the animal, as one which was not thorough bred. But the defendant is not prejudiced by this error; on the contrary it might have proved beneficial to him, and we cannot therefore reverse the judgment of the court in this respect.

We concur with the court below in the opinion by them expressed in the second bill of exceptions.

The witness is, in effect, asked to speak of the contents of a paper writing or document, without its production, for although he is asked whether, from his knowledge of the pedigree of the mare, he considered her to be a thorough bred mare, yet the question has manifestly reference to the pedigree detailed in a paper which he is asked if he had seen, as the foundation for the question in relation to his opinion of the pedigree.

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Mitchell vs. Mitchell.—1843.

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We also think the court were right in refusing to permit the evidence of the contents of the certificate to be given in evidence to the jury, as a proper foundation had not been laid for the introduction of such evidence.

JUDGMENT AFFIRMED.

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HENRY S. MITCHELL A. D. B. N. OF JAMES D. MITCHELL vs.  
ANN M. MITCHELL, ADM'X OF JOSEPH T. MITCHELL.  
*December 1843.*

The security of an administrator may, under circumstances, become a competent witness for his principal to maintain an action of law to recover money due the intestate's estate; although at one period the administrator may have been guilty of a *devastavit* in relation to the same claim.

As where from lapse of time, after due notice having been given under the testamentary act to creditors to assert their claims, they are presumed to have been satisfied and none appeared to exist, and where the sole distributee of the deceased had released both the administrator and sureties from all claims, this obviates all objection on the ground of liability on the surety for the omission of the administrator.

Where a bill of exceptions is sealed, the truth of the facts contained in it, can never afterwards be disputed.

A release to an administrator and his sureties may be legally recorded in the orphans court of the county where letters of administration were granted, and a copy certified by the Register of Wills of the same county is competent evidence.

An administrator in his settlement with a distributee may assign the choses in action of his intestate by parol.

The Register of Wills is authorised and bound to record administration accounts proved and passed, and a copy under his official seal is competent evidence.

Where letters of administration were granted in 1830, and an order of court notifying creditors to bring in their claims obtained and published in 1831, and an account proved and passed in 1832, by which it appeared that a number of creditors had been paid, *it was held* in 1842, no unsatisfied creditors appearing in proof, that all the creditors of the estate were paid and discharged.

The act of 1828, ch. 165, which authorises the taking of testimony in civil cases, before commissioners to be appointed by the county courts, manifestly contemplates a case where both the plaintiff and defendant are in existence and actually parties to the litigation upon the record at the time the notice



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Mitchell vs. Mitchell.—1843.

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is given by the commissioners, and the deposition taken in pursuance thereof.

So where a defendant is dead, and no new party having been made, a deposition taken is without authority under that act.

Where commissioners are appointed under an Act of Assembly by the courts to take proof between parties, no rule of court can transfer powers to the commissioners, designed by the act to be exercised by the courts or the judges thereof.

Acts of Assembly made relative to the administration of justice are to be liberally construed for the attainment of that important object.

It is the province of courts of justice to expound laws and not to legislate.

### APPEAL from *Charles County Court*.

This was an action of Assumpsit, brought by the appellee against *James D. Mitchell* on the 22nd July 1833. Pending the action *J. D. M.* died, and his executrix *Elizabeth A. Mitchell* (who also died,) and the present appellant were successively made parties to the case. The defendants pleaded non-assumpsit and limitations on which pleas issues were joined.

Before the trial the parties filed the following agreement:

It is agreed in this cause that the attendance, in person, of *William Carmichael*, a witness on the part of the defendant, may be dispensed with at the trial of this cause, whenever the same may take place, and that in lieu thereof, certain letters from the said *Carmichael* to the late *James D. Mitchell* and *Joseph T. Mitchell*, on the subject of a receipt by him, and the payment over of certain moneys by him collected, to a certain *Joseph T. Mitchell*, on the order of said *James D. Mitchell*, may be used and read as evidence in the cause at the trial thereof. It is further agreed, that the plaintiff, as administratrix of *Joseph T. Mitchell*, give the necessary and usual notice required by law for creditors to present their claims against the estate of said *Joseph T. Mitchell*, and that the same was published in the *Kent Enquirer*, a newspaper published in *Kent* county, for the time and in the manner as the law directs, the evidence of which may be received from the paper herewith filed, marked exhibit A. It is further admitted, that the personal estate of *Joseph T. Mitchell*, was more than solvent, and that a large residuum was left for distribution among the rep-

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Mitchell vs. Mitchell.—1843.

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representatives and heirs at law, after the payment of all debts, which were presented for payment. The above letters are to be made subject to all legal exceptions as to their admissibility or competency, other than those now waived by this agreement.

THOMAS F. BOWIE, for Defendant.

WILLIAM L. BRENT, for Plaintiff.

EXHIBIT A—referred to in the foregoing agreement:

MARYLAND, *Kent County Orphans Court.*

November 30, 1830. On application of *Ann M. Mitchell*, administratrix of *Joseph T. Mitchell*, late of *Kent county*, deceased, it is ordered, that she give the notice required by law for creditors to exhibit their claims against the said deceased's estate, and that the same be published once in each week for the space of three successive weeks, in the *Enquirer*, printed in *Chestertown*.

In testimony that the foregoing is truly copied from the minutes of the proceedings of the orphans court of the county (Seal.) aforesaid, I have hereto set my hand and the seal of my office affixed, this 30th day of November, 1830.

Test,—F. WILSON, *Register of Wills for Kent County.*

In compliance with the above order, this is to give notice, that the subscriber, of *Kent county*, hath obtained from the orphans court of *Kent county*, in *Maryland*, letters of administration on the personal estate of *Joseph T. Mitchell*, late of *Kent county*, deceased. All persons having claims against the said deceased's estate, are hereby warned to exhibit the same with vouchers thereof, to the subscriber, at or before the 30th day of May next, they may otherwise by law be excluded from all benefits of the said estate. Given under my hand, this 30th day of November, 1830.

ANN M. MITCHELL,

December 3. *Adm'x of Joseph T. Mitchell, deceased.*

LETTERS referred to in the foregoing agreement:

CENTREVILLE, 26th March, 1828.

Dear Sir,—Your uncle, *Joseph Mitchell*, spoke to me when I was last in *Kent county*, as if he had supposed you had given me instructions to proceed by execution against *Gerald Cour-*

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 Mitchell vs. Mitchell.—1843.
 

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sey. As I have received no instructions from you on this subject, I beg you will give me directions. *G. Coursey* paid me last fall \$1,000, of which I paid \$950 by your order, to *Mr. Joseph T. Mitchell*.

I think it right to say to you on this subject, that I believe *G. Coursey*, by some indulgence, will pay your debt and save his property, but from the entire depressed state of the country, his property would now be sacrificed if sold by the sheriff, but being your agent in this business, I will promptly execute any orders you may send. I remain, very respectfully, yours,

WM. CARMICHAEL.

JAMES D. MITCHELL *Dr.* to WM. CARMICHAEL.

1828. Jan. 5,	To cash p'd Jos. T. Mitchell by your order	\$950
Dec. 19,	To ditto paid ditto per ditto	950
	To commission on \$2000, at 5 per cent.	100

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\$2,000

*Contra.*

1827. Nov. 24,	By cash from <i>G. Coursey</i> on judgments	\$1,000
1828. Dec. 9,	By ditto from do. on do.	1,000

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\$2,000

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CENTREVILLE, 29th April, 1829.

*Dear Sir*,—I this day received yours of the 24th, and send you an extract from my books by which you will see the amount of monies received from *G. Coursey* and paid over to *Mr. Joseph T. Mitchell*. I am, respectfully, yours,

WM. CARMICHAEL.

CENTREVILLE, 17th November, 1830.

*Dear Sir*,—Pressing engagements and absence from home have prevented me from giving an earlier answer to yours of the 27th ultimo. I subjoin an account taken from my books, by which you will see the monies received and paid over to your uncle. After my last payment to him, I wrote him that a balance was due me from your father, which I neglected to deduct, and requested him to retain the same in his hands, but did not



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 Mitchell vs. Mitchell.—1843.
 

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hear from him afterwards. This balance you can settle at your convenience. I am, respectfully, yours,

WM. CARMICHAEL.

JAMES D. MITCHELL *Dr.* to WM. CARMICHAEL.

1828. Jan. 5,	To cash paid Joseph T. Mitchell,			
	per your order			\$950 00
Dec. 19,	To do.	do.	per do.	950 00
1829. Oct. 15,	To do.	do.	per do.	950 00
1830. Ap'r 27,	To do.	do.	per do.	300 00
	To do.	do. by check on		
	Bank of Baltimore			384 32
	To costs of three suits			19 50
	To commission, at 5 per cent.			187 01
				<hr/>
				\$3,740 83

*Contra.*

1827. Nov. 24,	By cash from G. Coursey on judg'ts	\$1,000 00
1828. Dec. 8,	By do. from do.	1,000 00
1829. Sept. 12,	By do. from do.	1,000 00
1830. April 8,	By do. from do. balance of jud'ts	720 72
	By costs of three suits	19 50
		<hr/>
		\$3,740 22

E. E.

WM. CARMICHAEL.

No. 7, referred to in the foregoing agreement:

RICHARD HALL, use of James D. Mitchell, ex'r of France, vs.

GERLAND COURSEY. Judgments, &c.

Amounts of debt	-	\$1,337 50
Interest on same from 1st Jan. 1823 to 1st Jan. 1825		168 50
		<hr/>
		1,498 00
Int. paid as per endorsement on bonds,		175 57
		<hr/>
		1,322 43
Interest on same to 24th November 1827		150 75

Same, executor of same, vs. Same. Judgments.

Amount of debt	-	1,337 50
Interest on same from 1st January 1823 to 24th		
November 1827, (393.33)	-	394 71

Mitchell *vs.* Mitchell.—1843.Same, executor of same *vs.* Same. Judgments.

Amount of debt	-	-	-	368	87
Interest on same from 1st Jan. 1823 to 24th Nov. 1824	108	75			
				3,683	01
Then paid W. C., attorney	-	-	-	1,000	00
				2,683	01
Interest on same to 8th December 1828	166	64			
				2,849	65
Then paid W. C., attorney	-	-	-	1,000	00
				1,849	65
Interest on same to 20th December 1828	3	69½			
				1,853	34½
Credit then allowed by Joseph T. Mitchell	225	15			
				1,628	19½
Interest on same to 12th September 1829	68	52			
				1,696	71½
Then paid W. C., attorney	-	-	-	1,000	00
				696	71½
Interest on same to 8th April 1830	24	01			
Costs of judgments	-	-	-	6	55
Costs of do.	-	-	-	6	55
Costs of do.	-	-	-	6	40
				\$740	22½

E. E.

WM. CARMICHAEL.

*Amount received by William Carmichael as by above statements:*

1827. Nov. 24, Cash	-	-	-	\$1,000	00
1828. Dec. 8, do.	-	-	-	1,000	00
1829. Sept. 12, do.	-	-	-	1,000	00
1830. April 17, Paid W. C., by cash deposited in Bank of Baltimore, the 8th				740	22
				\$3,740	22

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 Mitchell vs. Mitchell.—1843.
 

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*Contra.*

1828. Jan. 5,	Cash p'd Jos. T. Mitchell by your order	\$950 00
1828. Dec. 9,	To do. by do.	950 00
1829. Oct. 15,	To do. by do.	950 00
1830. Ap'l 27,	To do. by do.	684 32
	To commission on \$3,740.22, at 5 pr. ct.	185 01
	To costs of suit on three judgments	19 50
		<hr/>
		\$3,738 83
		<hr/>

CENTREVILLE, April 30, 1830.

*Dear Sir,*—According to my promise, I now send you a statement of the money collected from *Mr. G. Coursey*. I have an unsettled account with *Mr. James D. Mitchell* on account of business transacted for his father; the balance due me is between \$60 and \$70. I intended to have retained to this amount, and to have rendered him an account, but it escaped me in the hurry of the moment, and as it is inconvenient for me to transact business with *Mr. Mitchell*, I beg you to have the goodness to reserve that sum for me, as I will render *Mr. M.* the accounts.

I have thought on *Williamson's* business since you left me. I have a judgment against him but not against you, and could only due the replevin bond. There are several cases, and it would greatly increase costs, but I must be governed in this by your determination. I remain respectfully yours,

WM. CARMICHAEL.

1ST EXCEPTION. At the trial of this cause, the plaintiff to support issues on her part joined, offered in evidence to the jury the several promissory notes, and the due bill set forth in the declaration, and proved the same to have been signed in the proper hand-writing of *James D. Mitchell*, the defendant's testator, and also proved the hand-writing of *James W. Mitchell* on the notes of 23rd Nov. 1820; but offered no evidence of the hand-writing of *Elizabeth Mitchell*, by whom the said due bill purports to have been assigned.



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Mitchell vs. Mitchell.—1843.

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\$1,030. Six months after date, I promise to pay to Joseph T. Mitchell, or order, negotiable at the Bank of Maryland, one thousand and thirty dollars, for value received, this 20th October 1828.

JAMES D. MITCHELL.

\$1,220. On the 8th July next, I promise to pay to Joseph T. Mitchell, or order, negotiable at the Bank of Maryland, twelve hundred and twenty dollars, for value received.

*Baltimore, 20th October 1828.* JAMES D. MITCHELL.

\$200. *Baltimore, 23rd November 1829.* On the first day of October 1830, I promise to pay to the order of James W. Mitchell, two hundred dollars, for value received.

JAMES D. MITCHELL.

On the back of the foregoing promissory note is thus written, to wit, James W. Mitchell.

\$200. *Baltimore, 23rd November 1829.* On the first day of June 1830, I promise to pay to the order of James W. Mitchell, two hundred dollars, for value received.

JAMES D. MITCHELL.

On the back of the foregoing promissory note is thus written, to wit, James W. Mitchell.

And then, for the purpose of maintaining the issues joined on her part on the second and third pleas, on the pleas of limitations, and for the purpose of proving an acknowledgment of the said *James D. Mitchell*, within three years before the present suit was brought, of his indebtedness on said notes, and also to prove the hand-writing of *Elizabeth Mitchell*, to the assignment of the said bill, offered to swear to the jury *William L. Brent*, but the defendant produced an authenticated copy of the administration bond of the plaintiff on *Joseph T. Mitchell's* estate, dated 30th November 1830. Certified to be a true copy of the administration bond given by *Ann M. Mitchell*, administratrix of *Joseph T. Mitchell*, as taken from the original bond now on file in his office, by the Register of Wills of *Kent county*. And proved that the said *William L. Brent* was one of the plaintiff's sureties in said bond, and objected to the competency of said witness, on the ground that he was liable

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Mitchell vs. Mitchell.—1843.

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for any *devastavit* which the plaintiff might have committed in the administration of said estate as the plaintiff's surety, and that under the circumstances of this case, and in the present cause, said witness had an interest in the result of this suit. This objection on the part of defendant to the competency of said witness, the court sustained, and thereupon, the plaintiff, for the purpose of showing that said witness was competent to give the testimony for which he was called, produced the following papers, to wit, the administration account of *Ann M. Mitchell* on *Joseph T. Mitchell's* estate, passed and sworn to on the 12th of May 1832, which showed a balance due the estate, consisting of negroes not divided \$2,812, and which was also certified to be a true copy taken from the records of his office, by the Register of Wills for *Kent* county, under his official seal.

And also read the agreement and exhibits in this cause, filed 21st August 1841. See ante.

And also a certified copy of the release of *Joseph T. Mitchell, Jr.*, the sole heir at law of *Joseph T. Mitchell*, who is admitted to have been of full age, and also the original release:

MARYLAND, *Kent County, Sct.* I hereby certify, that it appears from an administration account, passed by *Anna M. Mitchell*, administratrix of *Joseph T. Mitchell*, late of *Kent* county, on the 12th May 1832, that after the payment of all just debts and claims due and owing by the said *Joseph T. Mitchell*, that there was a considerable balance due the estate, amounting to the sum of \$2,812, and consisting of negroes undivided; and I also certify, that on the 1st May 1838, *Joseph T. Mitchell*, the sole child and heir at law of the said *Joseph T. Mitchell*, deceased, appeared in open court, in the orphans court of the said *Kent* county, and the said court being satisfied that he was of legal age, filed, to be recorded in my office, a release in the following words and figures, and which was accordingly recorded by order of the said court: Whereas, a settlement has taken place between my mother, *Mrs. Anna M. Mitchell*, as administratrix of my deceased father, *Joseph T. Mitchell*, and as my acting guardian, and I

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have received from her full possession of my estate, real, personal and mixed, it is my desire to place on record, the evidence of such full settlement and a full discharge of her sureties; this therefore is to certify, that I do acknowledge the receipt in full of all the share or portion of my said deceased father's estate, to which I am entitled, and I do hereby release, acquit and discharge the said *Ann M. Mitchell*, and her sureties, and her and their executors or administrators, of and from all claim and demand therefor. Given under my hand and seal, this first day of May, eighteen hundred and thirty-eight.

JOSEPH T. MITCHELL, (Seal.)

Witness,—*Samuel Covington*.

MARYLAND, *Kent county, Sct.* Be it remembered, that on this first day of May, eighteen hundred and thirty-eight, before me the subscriber, a justice of the peace of the State of *Maryland* for *Kent county*, personally appeared the within named *Joseph T. Mitchell*, and acknowledged the foregoing receipt and release as his act and deed, and to be discharged for the purposes therein mentioned. Acknowledged before,

SAMUEL COVINGTON.

I hereby certify, that the above is a true copy of the original release, now on record in my office. In testimony (Seal.) whereof, I have hereto subscribed my name and affixed the public seal of my office, this 11th day of August, 1841.

JAMES F. BROWNE,

*Register of Wills for Kent County, Md.*

Whereas, a settlement has taken place between my mother, *Mrs. Ann M. Mitchell*, as administratrix of my deceased father, *Joseph T. Mitchell*, and as my acting guardian, and I have received from her full possession of my estate, real, personal and mixed, and it is my desire to place on record the evidence of such full settlement, and a full discharge of her sureties; this therefore is to certify, that I do acknowledge the receipt in full of all the share or portion of my said deceased father's estate, to which I am entitled, and I do hereby release, acquit and discharge the said *Anna M. Mitchell*, and her sureties, and her and their heirs, executors or administrators, of and from



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Mitchell vs. Mitchell.—1843.

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all claim and demand therefor. Given under my hand and seal, this first day of May, eighteen hundred and thirty-eight.

JOSEPH T. MITCHELL, (Seal.)

Witness,—*Samuel Covington.*

On the back of the foregoing is thus endorsed: "Filed May 1st, 1838. Recorded in Liber B book, vouchers No. 5, folio 328.

J. F. BROWNE, *Register Wills.*"

And also the following assignment of the plaintiff, of the choses in action in the present suit, to the said *Joseph T. Mitchell, Jr.*

*Know all men by these presents, That I, Ann M. Mitchell, administratrix of all and singular the goods and chattles, &c., of my late husband, Joseph T. Mitchell, having paid all the creditors of the said, the late Joseph T. Mitchell, do hereby assign, transfer and set-over to Joseph T. Mitchell, the sole child and distributee of my said husband, deceased, by way of distribution, all the choses in action and evidences of debt, filed in the Charles county court of the State of Maryland, in a suit brought by me, as administratrix of the said Joseph T. Mitchell, deceased, against James D. Mitchell, and now pending against the executrix (or administratrix,) of the said James D. Mitchell. Witness my hand and seal, this 17th day of August, 1831.*

ANN M. MITCHELL, (Seal.)

From which said papers, and the facts in evidence as aforesaid, the said plaintiff contended and insisted before court, that the said witness was released from all liability on said bond, and that he was in consequence of said release, a competent witness in the present suit, which opinion the court, (C. DORSEY, A. J.) gave, and permitted the said witness to be sworn to the jury for the purpose aforesaid; to which opinion of the court, and to their permitting the said witness to be sworn to the jury as a competent witness in this cause, the defendant excepted.

2ND EXCEPTION. In addition to the evidence in the previous bills of exceptions, which is made a part of this, the defendant in support of the issues on his part joined, gave in evidence

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to the jury, that *Elizabeth Mitchell*, the administratrix of *James D. Mitchell*, who was a party to this suit previous to her death, departed this life during August court eighteen hundred and forty-one; then gave in evidence to the jury, that letters of administration *de bonis non* was granted by the orphans court of *Charles* county to defendant, on the 14th September, 1841; and then offered to read in evidence to the jury the deposition of *Richard B. Mitchell*, as follows:

At the request of *Henry S. Mitchell*, the following notice and deposition was recorded this 23rd day of March, Anno Domini 1842.

*To Mrs. Ann M. Mitchell, or her attorney:*

You will please take notice, that I shall on the 25th day of the present month, between the hours of 10 o'clock A. M. and 2 o'clock P. M. of the same day, at *Myrtle Grove*, the residence of *Mr. Henry S. Mitchell*, in *Charles* county, *Maryland*, at the request of said *Henry S. Mitchell*, then and there proceed to take the deposition of *Mr. Richard B. Mitchell*, who is now dangerously ill at said place, and not expected to live, to be read as evidence in the trial of the cause now depending in *Charles* county court, in which *Ann M. Mitchell*, administratrix of *Joseph T. Mitchell*, is plaintiff, and *Elizabeth A. Mitchell*, executrix of *James D. Mitchell*, is defendant.

January 24th 1842. JAMES BRAWNER, Commissioner.

Service admitted this 24th day of January, at  $\frac{1}{2}$  past 4 o'clock P. M., for what it is worth.

WM. L. BRENT,

*At Washington city, District Columbia.*

ANN M. MITCHELL, Adm'x of J. T. Mitchell, vs. E. A. MITCHELL, Ex'x of J. D. Mitchell. Interrogatories to *R. B. Mitchell*, on the part of the defendant.

Interrogatory 1st, 2nd and 3rd.

CHARLES COUNTY, Sct. At the instance of *Mr. Henry S. Mitchell*, the undersigned, a commissioner appointed by the Honorable the judges of this court, under an act of Assembly passed at December session 1828, ch. 165, in accordance with a previous notice served on *William L. Brent, Esq.*, attorney for *Mrs. Ann M. Mitchell*, as will appear by reference to said

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Mitchell vs. Mitchell.—1843.

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within notice, herewith returned, did attend at *Myrtle Grove*, the residence of *Mr. Henry S. Mitchell*, on the 25th January 1842, between the hours of 10 o'clock A. M. and 2 o'clock P. M., and proceeded to take the deposition of *Mr. Richard B. Mitchell*, who being sworn on the Holy Evangely of Almighty God, to the interrogatories propounded, answers as follows:

To the first interrogatory, yes. 2nd and 3rd, &c.

Taken and subscribed by me,

JAMES BRAWNER, *Commissioner*.

Taken by *James Brawner*, a commissioner appointed and duly qualified by the judges of *Charles county court*, to take depositions, in pursuance of the Act of Assembly passed at December session 1828.

The plaintiff then gave in evidence to the court, that said *Richard B. Mitchell* died on the 26th January 1842, and that he was expected to die for a week previous to the taking of said deposition. The plaintiff then gave in evidence, that at the time said deposition was taken, the death of *Elizabeth Mitchell*, the first administratrix of *James D. Mitchell*, was not suggested on the record; and further gave in evidence, that *William L. Brent*, the attorney, upon whom the notice of the commission was served, resided in *Washington city*, thirty miles distant from the place where the said deposition was taken. The defendant then gave in evidence, that *Frederick D. Stone*, who served the notice on said *Brent*, returned on horseback, and in time to be present at the time said deposition was taken. And the plaintiff further gave in evidence, that the said plaintiff resided in the city of *Baltimore*, in *Maryland*, at the time said notice was given; and further gave in evidence, that the present defendant *Henry S. Mitchell* did not appear to the present cause until August court 1842.

The defendant then read in evidence the following rule of court, made in pursuance of the Act of Assembly passed at December session 1828: "In pursuance of the directions of the act of the General Assembly of the State of *Maryland*, passed at the December session 1828, ch. 165, we, the judges of the county court for the county of *Charles*, do hereby appoint *James*



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Mitchell vs. Mitchell.—1843.

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*Brawner, senior, John Hughes and George D. Parnham*, commissioners to take the depositions of witnesses in the cases therein provided, and that in all cases when they act as such, they shall first serve, or cause to be served on the party against whom such deposition or depositions are intended to be used, or his attorney, a written notice containing the name of the person or persons whose deposition or depositions are intended to be taken; and the time and place, when and where it is to be taken, at least eight days before said day, exclusive of the day of issuing and serving such notice; and also in all cases when a real cause exists, the parties or party interested upon making it appear to the satisfaction of the commissioner or commissioners, that his witness is very old, sick, or about to leave the country, it shall or may be discretionary to take the deposition or depositions of such witness, on giving such notice less than eight days as they may think reasonable, all circumstances considered, so that the party interested, his guardian, agent, trustee or attorney, may have a convenient time to attend; and if such party and his attorney, &c., cannot be found, then by leaving said notice at his last place of abode, a copy of which, certified by the commissioner or commissioners, and attested to be served as herein provided, shall be returned by the said commissioner or commissioners, as the case may be, to the clerk of the county court, with the deposition or depositions so taken; and the court do allow the said commissioners the sum of four dollars to each commissioner for each day they may act as such.

*November 17th, 1829.*

J. STEPHEN;  
EDMUND KEY,  
J. R. PLATER.

The plaintiff then objected to the reading of said deposition in evidence to the jury, because said deposition had not been taken in pursuance of said Act of Assembly and supplement thereto, because the said *Henry S. Mitchell*, the administrator *de bonis non*, was not a party to the record, which objection the court (C. DORSEY, A. J.) sustained; to which opinion of the court the defendant excepted.

The defendant appealed.

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Mitchell vs. Mitchell.—1843.

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The cause was argued before STEPHEN, ARCHER, DORSEY and CHAMBERS, J.

By T. F. BOWIE for the appellant, and

By R. J. BRENT for the appellee.

STEPHEN, J., delivered the opinion of this court.

Two exceptions were taken to the opinion of the court below in this case, both of which relate to questions of evidence. In the first exception, the witness produced to give evidence for the plaintiff being incompetent, by reason of interest, certain paper writings or documentary proofs were offered in evidence, for the purpose of restoring his competency, which being held by the court sufficient for that purpose, the defendant excepted. Much of the argument urged by the appellant's counsel is rendered unavailing by certain admissions and facts stated in the bill of exceptions and the operation of law upon those facts and admissions. In 2 *Tidd's Practice*, 913, the following principle of law is stated in relation to the legal effect and conclusiveness of a bill of exceptions: "when the bill of exceptions is sealed, the truth of the facts contained in it, can never afterwards be disputed; for this principle, *Show. P. C.* 120, is referred to. The ground upon which the witness produced by the plaintiff was contended to be incompetent, being his liability for any *devastavit* of the plaintiff, as her surety in the administration of her husband's estate, one of the proofs produced to obviate that objection, was a release executed by *Joseph T. Mitchell*, who is stated in the bill of exceptions to be the sole heir at law of his father *Joseph T. Mitchell*, and who is expressly admitted in said bill of exceptions to have been of full age at the time it was executed; a certified copy of said release was also produced, authenticated by the signature and seal of the Register of Wills for *Kent* county. This release contained an express acknowledgment that he had received his full share of his father's estate, and released the administratrix and her sureties from all responsibility therefor. This release was moreover executed after a lapse of eight years

from the time letters of administration were granted, and was acknowledged before a justice of the peace of *Kent* county, according to law, and was on the same day duly admitted to record. The administration bond, which was given in evidence by the defendant, to shew the incompetency of the plaintiff's witness, fully evinces that letters of administration were obtained from the orphans court of *Kent* county; and, consequently, proves that the acknowledgement was legally made, before a person competent to take it. There is nothing, therefore, in the objection raised by the counsel for the appellant, that it did not appear that the acknowledgment was made before a justice of the peace in the county where the letters were obtained, and that therefore the release was not legally recorded, so as to make a copy of it admissible in evidence. In 2 *Harr. & Gill's Rep.* 57, this court, when speaking upon a similar subject, say: "they were recorded in the office of the Register of Wills of *Prince George's* county, where *George Briscoe* died, and where, of course, letters of administration were taken out on his estate, having been previously acknowledged before the said Register. So in 6 *Harr. & John. Rep.* 234, this court say, "where an instrument of writing is required by law to be recorded, the enrolment of it is evidence of all circumstances necessary to give it validity. But this evidence is not conclusive, it is only *prima facie*, and like all *prima facie* evidence, may be rebutted." The condition of the administration bond given in evidence by the defendant, speaks of *Ann Mitchell*, as the administratrix of *Joseph T. Mitchell*, late of *Kent* county, deceased; and where of course, as this court say in 2 *Harr. & Gill*, 57, letters of administration were taken on his estate. No sufficient proof was adduced in the court below to impeach the release or to impair its validity: the written assignment made of the *choses in action* in August 1841, was not sufficient to invalidate it upon the ground of fraud, as they might have been transferred by parol when the release was executed; and the written assignment subsequently made, might have been intended, as more authentic and better evidence of that fact. As further proof of the competency of the witness to testify



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in the cause, the plaintiff offered in evidence a copy of her administration account, which is stated in the bill of exceptions to have been passed by the court on the 12th of May 1832, and is certified by the Register to be a true copy, taken from the records of his office, and is authenticated by the seal of his office annexed. The admissibility of this account was objected to upon the ground that the Register had no authority by law to record it, and that therefore a copy was not evidence. We think that such an objection was entirely groundless and untenable; that the Register was not only authorised, but bound by law to record it, for the purpose of shewing to creditors and others interested in the estate, how and in what manner the assets had been administered. By the act of 1798, ch. 101, sub-ch. 15, sec. 9, it is enacted that, “the Register of Wills in each county already, or hereafter to be appointed, agreeably to the Constitution, shall diligently attend each meeting of the orphans court in his county, and under their direction, make full and fair entries of their proceedings;” among which proceedings are manifestly intended to be embraced, all administration accounts passed and settled under the sanction of such courts. This account, in which a number of creditors appear to have been paid, was passed by the orphans court, after notice had been given agreeably to the order of said court for creditors to exhibit their claims for payment, in the year 1832, more than ten years prior to the trial of this case in the court below, and considerably more than twelve months after the said notice had been published according to said order. After such a lapse of time, it was we think fair to presume, that there were no outstanding claims of creditors to be satisfied, when this case was tried in the court below, and that the witness was not on that account incompetent to testify. The administration bond offered in evidence by the defendant, bearing date on the 30th day of November, in the year 1830, and the cause was tried in *Charles* county court at the August term 1842, a period of nearly twelve years had therefore elapsed from the date of the letters, before the trial in this cause took place. In the absence, therefore, of any proof of indebtedness, it is, we think, fair to

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infer, that they were all satisfied and discharged at the time the surety in the bond was offered as a witness. In 5 *Gill & John. Rep.* 344, this court say: "it appears then, that a period of about eleven years had expired, from the time letters of administration were taken out upon his estate, before the mortgage was executed;" and this court have said in the case of *Allender and Riston*, 2 *Gill & John.* 86, "in the case now before this court, it no where appears that there were any debts remaining due and unpaid at the time of the mortgage, or if there were, that the defendants knew of them;" and to use the language of *Mr. Justice Ashhurst*, in 4 *Term Rep.* 645, "if the creditors will lie by, and not assert their rights, it is reasonable for a third person to suppose that all the debts are satisfied." Under this view of the case, we think that the opinion of the court below in the first bill of exceptions was correct, and that all objection to the competency of the witness was sufficiently removed.

We think, also, that there was no error in the opinion of the court below in the second exception. The defendant in the suit was dead, and no new party had been made when the notice was given and the deposition was taken by the commissioner. The act of 1828, ch. 165, under which the deposition was taken, manifestly contemplates a case where both plaintiff and defendant are in existence, and actually parties to the litigation upon the record at the time the notice is given by the commissioner, and the deposition is taken in pursuance thereof. The language of the 2nd section of the act is, "that either party, in any action depending in the said courts, after due notice to the other party or his attorney, agreeably to such rule as shall be made by said courts respectively, may take the deposition of any witness before any one of the said commissioners, to be used as testimony on the trial of such action." The defendant in this case being dead, and no new party having been made, the deposition was taken without legal warrant or authority, according to the provisions of this act, and was, therefore, properly rejected by the court. We wish it to be understood, that in deciding the question as to the admissibility

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of the deposition offered in evidence in this case, we have been governed exclusively by what we deem the true construction of the Act of Assembly under which it was taken; and we do not wish to be understood as giving any sanction to the rule of court upon that subject, adverted to in the course of the argument, and which rule we think confers a power upon the commissioners, which was intended by the legislature to be exclusively exercised by the courts, or the judges thereof. It is true, that Acts of Assembly made relative to the administration of justice, are to be liberally construed for the attainment of that important object, but it is the province of courts of justice to expound laws, and not to legislate; that is a duty which belongs to a different department of the government. We think that there is no error in the judgment of the court below, and that the same ought to be affirmed.

JUDGMENT AFFIRMED.

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DAVID WOLFE, JUNIOR, vs. GEORGE HAUVER, ADM'R C. T. A.  
OF GEORGE HAUVER, JUNIOR.—December 1843.

The receipt in a deed for the conveyance of land is only *prima facie* evidence of the payment of the purchase money.

It is a familiar principle that receipts acknowledging the payment of money may be explained or contradicted. This constitutes an exception to the general rule giving a conclusive effect to written evidence; an exception introduced for general security and convenience, and to protect mankind from fraud.

The cases of *Wesley vs. Thomas*, 6 Harr. & John. 24; *Watkins vs. Stockett*, 6 H. & J. 435; *Bette vs. The Union Bank*, 1 H. & G. 175; *Hurn vs. Soper*, 6 H. & J. 277, were instances in which efforts were made to change the character of deeds, or to vary the consideration stated in them, and thereby either to alter their nature and character; or maintain a deed impeached for fraud, by setting up a different consideration from that stated on its face.

A receipt for the purchase money is no necessary part of a deed, as it would, in every respect, be as valid without it, as with it.

Though a party cannot discredit his own testimony, yet he may show that his witness is mistaken; and is not precluded from showing the truth by any testimony, oral or written, which he may produce.



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Where the only question presented for the consideration of the court below, was the admissibility of the parol evidence offered, this court will not, since the act of 1825, ch. 117, entertain the enquiry, whether the particular action brought will lie for want of written evidence as required by the statute of frauds.

Where the bill of exceptions does not assert that the evidence offered, was all which was adduced by the plaintiff, this court will not assume that it contained all that was produced, for the purpose of raising a question, not presented by the record.

Where a witness proved the admission of a debt by the defendant in a conversation with him, he cannot, in reply to the question of why he called on the defendant, be permitted to testify to information which he had received from other persons strangers to the action; though it constituted the inducement to call on the defendant, it was hearsay.

It is the duty of parties where they design to introduce hearsay evidence for the purpose of impeaching a witness, to apprise the court of such design.

It is incompetent to introduce illegal testimony, and then impeach the witness, by disproving the facts thus illegally established.

A declaration that the defendant is indebted in the sum of, &c., for land called, &c., containing, &c., before that time bargained and sold, delivered and conveyed, by deed bearing date, &c., by the plaintiff to the defendant, and being so indebted, in consideration thereof, undertook and promised, &c., is sufficient to maintain a demand for unpaid purchase money.

The conveyance of land, delivery of possession in pursuance of a deed, or in other words, the execution of the contract on the part of the plaintiff, as vendor of land, raises a duty on the part of the vendee to pay the consideration money which will sustain the judgment of the court.

The law equally implies a promise to pay for land sold and delivered, as it does in the case of the sale of goods, wares and merchandize.

### APPEAL from Frederick County Court.

This was an action of *trespass upon the case*, &c., commenced on the 27th January 1841, by the appellee against the appellant. The plaintiff below declared for, that the defendant “was indebted to the said *George*, in his life time, in the sum of, &c.; current money, for certain parts or parcels of land called *Good Luck*, &c.; in the whole 202 $\frac{3}{4}$  acres of land, before that time bargained and sold by the said *George*, in his life time, to the said *David*, and under and by virtue of that bargain and sale delivered, and by deed of bargain and sale by the said *George*, in his life time, bearing date on, &c., to the said *David*, conveyed at the special instance and request of the said *David*; and being so indebted, he the said *David*, in consideration,

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&c., &c., with the usual promise, undertaking and conclusion. The defendant pleaded *non-assumpsit*, on which issue was joined.

After verdict, the defendant moved in arrest of judgment:

1. Because the declaration is in substance defective and insufficient on general demurrer.

2. Because an action of *indebitatus assumpsit* cannot be sustained for the purchase money of the land specified in the plaintiff's declaration.

3. Because the plaintiff should have declared specially on the contract of sale of said land, and set forth the terms of sale and the mode of payment, according to the true intent and meaning of the parties to said agreement of sale, which motion was overruled.

At the trial of this issue the following exceptions were taken:

1ST EXCEPTION. The plaintiff to support the issue on his part joined, offered and gave in evidence the following deed from *George Hauver*, deceased, to the defendant, as follows, to wit:

This indenture made this 30th day of December, in the year of our Lord eighteen hundred and thirty-four, between *George Hauver of Frederick county and State of Maryland*, of the one part, and *David Wolfe, jr.* of the same place of the other part, witnesseth, that the said *George Hauver*, for and in consideration of the sum of two thousand dollars, current money of the *United States*, to him in hand paid by the said *David Wolfe, jr.*, on or before the sealing and delivery of these presents, the receipt whereof the said *George Hauver* doth hereby acknowledge, and from every part and parcel thereof doth hereby acquit, exonerate and discharge the said *David Wolfe, jr.*, his heirs and assigns forever. And the said *George Hauver* hath given, granted, bargained and sold, aliened, released, enfeoffed and confirmed, and doth hereby give, grant, bargain and sell, alien, release, enfeoff and confirm, unto the said *David Wolfe, jr.*, his heirs and assigns forever, all the following parts or parcels of land lying in the county and State aforesaid, to wit,

&c. To have and to hold the said lands and premises to the said *David Wolfe, jr.*, his heirs and assigns forever, his and their only proper use and behoof, and to and for no other use, intent or purpose whatsoever. He the said *George Hauver*, for himself, his heirs, executors and administrators, hath covenanted, and doth hereby covenant and agree, to and with the said *David Wolfe, jr.*, his heirs and assigns, to warrant and forever hereafter defend said lands and premises against him the said *George Hauver*, and against all persons claiming by, from or under him, them or any of them. In testimony, &c.

The plaintiff then proved by *Isaac Draper*, a competent witness, that the defendant, immediately after the execution and delivery of said deed, went into the possession of the land conveyed to him by said deed, and has continued in possession ever since, up to this time, and that the said *George Hauver* died in the month of August 1837. He then offered further to prove by said witness, that some time in or about the month of December 1838, the defendant, in conversation with him the witness, admitted that he had not paid all the purchase money for said land, as stated in the said deed, but that a part of it was yet due and unpaid; to the admissibility of which evidence the defendant by his counsel objected, on the ground that the deed itself which the plaintiff had offered in evidence, under the hand and seal of the said *George Hauver*, deceased, estopped him from averring or proving that he the said grantor had not received the purchase money as stated and admitted by him in said deed, but the court (TH. BUCHANAN, A. J.) was of opinion, that the testimony so offered by the plaintiff was legal and competent for the purpose for which it was offered, and permitted the same to go to the jury. The defendant excepted.

2ND EXCEPTION. In addition to the testimony offered in the first bill of exceptions, which is to be taken and considered as a part of this second bill of exceptions, the plaintiff proved by *John W. Miller*, a competent witness, that some time in the month of March 1839, he called upon the defendant to pay an account that he witness had against *George Hauver*, deceased;



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that *Wolfe* then told him that he had received a letter from *George Harman*, who married one of the heirs of said *Hauver*, deceased, offering to take \$100 for his share of the purchase money for the land mentioned in said deed; said witness was on his cross examination by the defendant asked by the defendant's counsel whether he was ever acquainted with the defendant; to which he answered, that they were entire strangers. The defendant's counsel then asked the witness why he had called on the defendant for the payment of the debt due to him, not by the defendant, but by the said *George Hauver*, deceased, in reply to which said question, the said witness said that some of the other heirs of said *George Hauver*, deceased, had told him that the defendant was to pay the debts of said *George Hauver*, deceased; to which answer of said witness the plaintiff objected, and the court (TH. BUCHANAN, A. J.) was of opinion, that the said answer was illegal, and not proper to go to the jury, and rejected the same, and refused to permit the witness to state to the jury that he had been informed by some of the heirs of *George Hauver* that the defendant was to pay the debts of *George Hauver*, deceased, on the ground, it was offering hearsay evidence in the cause; that the witness was competent to prove any thing that the plaintiff said to him, but that any thing said by other persons not connected with the suit, could not be given in evidence to the jury against the plaintiff; that if any other persons could prove that the defendant *Wolfe* was to pay the debts of *Hauver*, they are competent to do so, as witnesses, but that their declarations are not evidence; to which opinion and rejection the defendant excepted.

The verdict and judgment being against the defendant, he brought this appeal.

The cause was argued before STEPHEN, ARCHER, DORSEY and CHAMBERS, J.

By PALMER and F. A. SCHLEY for the appellants, and  
By BREngle and WORTHINGTON for the appellees.

ARCHER, J., delivered the opinion of this court.

The first question which arises in this case is as to the admissibility of parol evidence to show that the consideration acknowledged in a deed to have been paid, has not in fact been paid. Much contrariety of decision prevails in the various courts upon this question. The later *English* cases appear to be decisive against the admission of such testimony; while in this country the weight of authority is the other way. In *Ohio, Kentucky, South Carolina, Pennsylvania, New York, Connecticut, New Hampshire* and *Massachusetts*, the acknowledgment of the receipt of the consideration money in a deed has been held to be only *prima facie* evidence. While in *North Carolina, Alabama* and *Maine*, such acknowledgment is considered as an estoppel and conclusive. In our own State the decisions have been contradictory.

In the *General Court*, at May T. 1796, suit was instituted by *O'Neale against Lodge*, on a covenant for the sale of land, and the defendant relied on a receipt in the body of the deed given by the plaintiff to the defendant, and also on a receipt endorsed on the deed, acknowledging the receipt of the consideration money, as conclusive evidence of payment. The court, however, decided it was evidence of the lowest order, because it was but the mere formal part of a deed, and it was every day's practice to have a receipt on the back of a deed, when, perhaps, nine times in ten there was not a shilling paid. In 1802, in the case of *Dixon vs. Swiggett*, which was an action of *indebitatus assumpsit* for land sold, the same court determined that the plaintiff could not give any parol evidence to prove the non-payment of the consideration money, contrary to his express acknowledgment of it on the face of the deed. This question was again raised in this court in the year 1827, in the case of *Higdon and Thomas*, 1 *Harr. & Gill*, 139. There an action was instituted by *Higdon* against the defendants, on a contract for the sale of lands. The plaintiff offered in evidence the contract, and proved the execution and delivery of a deed to the defendant, in which the consideration money was acknowledged to have been received, and proved

that the defendant had, after the conveyance, entered into the possession of the lands conveyed; whereupon, the defendant moved the court to instruct the jury, that the plaintiff, upon the evidence offered by him, was not entitled to recover. Had the receipt in the deed operated as an estoppel upon the plaintiff, or furnished conclusive evidence of the payment of the purchase money, the direction prayed was the law of the case, and the plaintiff would not have been entitled to recover. So that the question was directly raised in the case, and it was decided by this court upon the authority of the *American* cases, that the receipt in a deed was only *prima facie* evidence of the payment of the purchase money. Since that period, we are not aware of any case which has not conformed to it. Certainly none have occurred in this court, and the subordinate tribunals, it is to be presumed, have yielded obedience to it. It would seem to be too late at this day, to agitate again this question, which we must consider as firmly settled as any other which could be presented to our consideration.

In the case of *Gully and Grubbs*, 1 *Marshall*, 388 '9, 390, the court say "they believe the consistent doctrine, and that which accords best with analogy, and with the practice and understanding of mankind, is that the acknowledgment in a deed of the receipt of the consideration, is only *prima facie* evidence of payment. The acknowledgment is inserted more for the purpose of showing the actual amount of consideration, than its payment, and it is in general inserted in deeds of conveyance, whether the consideration has been paid or agreed to be paid. If the consideration had not been paid, such an acknowledgment in a deed would be intended to mean that the specified amount had been assumed by note or otherwise. With these views we accord." It is a familiar principle that receipts acknowledging the payment of money may be explained or contradicted. This constitutes an exception from the general rule giving a conclusive effect to written evidence, and it has been properly said, that the exception was introduced for the general security and convenience, to protect mankind from fraud. If the receipt or release in the deed is



to operate as an estoppel, or to be considered as conclusive in its character as evidence, how could promissory notes, taken for the purchase money of land, be recovered? If they remained in the hands of the vendor, he would be estopped by his deed which acknowledged payment for the consideration money. Nor could there be any recovery on any parol contract, in writing, for the consideration money, if a deed acknowledging the payment had been made. To this extent the doctrine would seem to lead inevitably.

The determination of this court in *Wesley and Thomas*; *Stockett and Watkins*; *Betts and The Union Bank*, and *Hurn and Soper*, will, as we apprehend, be found to have no bearing on this question. These were cases in which efforts were made to change the character of deeds, or to vary the consideration stated in the deeds, and thereby either to alter their nature and character, or to maintain a deed impeached for fraud, by setting up a different consideration from that stated on the face of the deed. But in the case before us, the introduction of the evidence proposed to be offered, neither changes nor affects any right transmitted in the property conveyed by the deed; it operates no change in the legal character of the instrument, nor in any manner affects injuriously any part of the deed as a conveyance. The receipt of the purchase money is no necessary part of the deed, as it would, in every respect, be as valid without it as with it.

It is secondly insisted, that as the plaintiff had offered the deed in evidence, containing the receipt for the purchase money, it was incompetent for him to show that the purchase money had not been paid. The case of *Higdon and Thomas* furnishes a decision against this position. There the plaintiff offered the deed in evidence, and if the position now maintained was true, the instruction granted by the court below would have been affirmed; but it was on the contrary reversed. But independent of this authority, the principle is clear and undeniable, that although a party cannot discredit his own testimony, yet he may show that his witness is mistaken, and is not precluded from showing the truth by any testimony, oral or written, which he may produce.

It is contended under the first bill of exceptions, that there being no note or memorandum in writing of the agreement, signed, &c., for the sale of the land in question, as required by the statute of 29 Chas. 2, ch. 3, *the action of indebitatus assumpsit will not lie*. The bill of exception raises no such question, and none such was decided by the court below, and we are forbidden by the act of 1825, ch. 117, from the examination of this question. The only question presented for the consideration of the court below on this exception, is on the admissibility of the parol evidence offered, for the purpose of proving that the purchase money for the land had not all been paid. Whether the plaintiff did or did not produce any memorandum in writing, signed by the party to be charged, the record does not inform us, for the bill of exceptions does not assert that the evidence offered was all which was adduced by the plaintiff.

We concur with the court below in the opinion by them expressed in the second bill of exceptions. The evidence offered by the defendants was properly rejected as hearsay. It has been argued, that the answer should have been received that the defendants might have an opportunity of impeaching the witnesses testimony by calling up the witnesses to whom he referred, and by them disproving the witnesses statement; to this we think there are two objections, which would induce us to affirm the court's opinion: first, the defendant did not disclose to the court that his design by the introduction of the evidence, was to impeach the witness, of which, we think the court ought to have been apprised; and secondly, because it is incompetent to introduce illegal testimony, and then impeach the witness by disproving the facts thus illegally established.

After verdict, a motion in arrest of judgment was made, upon the ground, that the declaration is defective and insufficient, and two reasons are assigned for the motion, viz: that an action of *indebitatus assumpsit* will not lie for land sold, and that the plaintiff should have declared specially on the contract of sale, and set out the terms of sale and the mode of payment

according to the agreement of the parties. In *England*, the forms of pleading in *Wentworth* and in *Chitty* are given, corresponding with the present declaration.

In 1 *Chitty*, 338, it is said, the common counts relating to real property are for the price of a freehold or leasehold estate, &c., sold and conveyed to the defendant, when there has been no contract under seal, for the payment of the price. In 2 *Sand. Plead. and Evid.* 502, it is said, when speaking of the action of *assumpsit* by vendor against vendee of real property, it is usual to insert the common indebitatus counts. And the only doubt which has been thrown upon this question, has proceeded from 2 *Chit. Plead.* 32, *n. a.* But it will be found upon examination of the case of *James vs. Shore*, 1 *Stark Rep.* 426, referred to by *Chitty*, that the plaintiff sought to recover of the defendant, who had bought the land and refused to take it, the difference between the price at which it had been bought in by the defendant and that for which on a re-sale it had been purchased, and *Lord Ellenborough* said the commissioners were authorised to re-sell, and having re-sold these lots, they could not be considered as sold to the defendant. This, we think, furnishes no argument against the common count in the ordinary case of the sale of land.

In *New York*, it has been decided, that *indebitatus assumpsit* will lie in such case, 14 *John.* 210; 20 *John.* 38.

In *Connecticut* the same doctrine is maintained, and in *Belden and Seymour*, 8 *Con.* 313, it is treated as a settled doctrine, that an action of *assumpsit* will lie for the price of land agreed to be paid, and the court cite three cases in that State in which the action was maintained.

A contrary doctrine prevails in *Pennsylvania*, as appears by the decision of the court in 11 *Serg. and R.* 49, and the intimation given by the court in 7 *S. & R.* 311; but these decisions do not appear to us to be satisfactory. In the former case, the question submitted to the court was, whether, under an *indebitatus assumpsit* count, for goods sold and delivered, you could give evidence of the sale of a growing crop.



The reasons assigned for the judgment are, that the contract was special and executory; that a growing crop did not exist as goods, wares or merchandize, and was incapable of delivery as such, and that the count gave no notice to the defendant of an intention to recover for a growing crop. These may be very good reasons for the particular judgment of the court in that case; but they certainly do not apply to the count now under consideration; for here the contract is averred to have been executed by the delivery of a deed of bargain and sale, and full notice is given in the declaration of the character of the claim. The execution of the contract, the contract price, and the land sold, are all stated. In *Harris' Entries*, a count is also given, such as exists in this case, and in *Dixon and Swiggett*, 1 H. & J. 252, a general count was relied upon, and no objection appears to have been taken by the eminent counsel engaged in the case. In the case of *Repp vs. Repp*, MSS. decided by this court at June term 1842, there was a similar count. We may thus infer that this practice has long prevailed in this State, and we perceive nothing in principle to disturb it. The conveyance of the land and the delivery of possession in pursuance of the deed, or in other words, the execution of the contract on the part of the plaintiff, raises a duty on the part of the vendee to pay the consideration money, which will sustain the count. Why should not such a duty be created as well by the sale of land as by the sale of goods? It is said, the subject matter of the contract savours of the realty, and therefore the count is bad. But we have seen no case which sanctions this technical reason, and unless cases be furnished, deciding the question upon satisfactory grounds, we should feel ourselves bound to say, that the law equally implies a promise to pay in the case before us, as it does in the case of the sale of goods, wares and merchandize.

JUDGMENT AFFIRMED.

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Calvert vs. Coxo.—1843.

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CHARLES B. CALVERT, EXECUTOR OF GEORGE CALVERT, vs.  
RICHARD S. COXE.—*December 1843.*

In the absence of all proof to the contrary, judicial courtesy requires this court to presume, that the county court discharged its duty according to the rules and practice of such court, in awarding a commission to take testimony.

So where the county court assembled on the *first* day of the month, and proceedings were had in a cause, which resulted in the withdrawal of a juror, and on the *twenty-seventh* of the following month, the court ordered a commission on the motion of the plaintiff to be issued; but it did not appear when such motion was made, nor when, nor by whom commissioners were named, it is fair to presume, either that the defendant did name and strike commissioners, or that after reasonable notice, he failed to do so.

The motion of a suitor seeking a commission to take proof, is that a commission be issued, naming the place to which he wishes it to be addressed. The court then grants the usual order to name and strike commissioners.

The power of selecting the time and place of executing a commission to take testimony, addressed to commissioners out of Maryland, is confided by the terms of the commission, to their sound discretion.

A commission, addressed to commissioners of the *District of Columbia*, may be executed in *Virginia*.

In the execution of a foreign commission, no notice to the parties of the time and place of its execution is necessary. All the notice required, is that of the interrogatories sent out with the commission. Actual or constructive notice should be given to the opposite party in time for him to exhibit cross interrogatories before the transmission of the commission.

Five days notice given to a defendant, a resident of *Maryland*, of the time, and place of executing a commission in *Virginia*, about forty miles distant from his residence, is sufficient, and it is no objection that it was executed at the private residence of the witness.

A witness cannot be permitted to state the contents or effect and operation of a written instrument without producing it.

Facts proved on a former trial by a deceased witness, are admissible on a second trial of the same case. They could only be rejected on the presumption, that facts were proven on the first trial, which were inadmissible as evidence, which is not to be intended. The reasonable presumption is, that such facts were alone proved as were admissible. The court should act on this presumption upon the offer of proof of the deceased witness' testimony, until the contrary appeared.

A defendant who places his defence upon the finding by the jury, "that the compensation claimed by the plaintiff of the defendant, was, according to the agreement of the parties, to be paid out of the estate of C, in the hands of the defendant's testator," cannot ask the court to instruct the jury, that his testator was not personally liable, though the compensation had not

been paid. The failure to pay out of C's estate was a breach of the contract, for which the testator was personally liable.

In an action to recover compensation for professional services, the defendant placed his defence upon the finding by the jury, that a sum certain paid to the plaintiff, "was, according to the contract between the parties, to be paid upon the contingency of the *final decision* of the cause in favor of C's will," and if they so found, then the plaintiff was entitled to no additional compensation. At the time of making the contract, the law did not authorise, but shortly after the verdict in the will cause, an act was passed, which did authorise an appeal in such cases; services were rendered upon an appeal, and subsequently upon the reversal of the first judgment. The compensation first agreed upon had been paid between the time of rendering the verdict and the passage of the act authorising an appeal; HELD: as there was other evidence tending to show, that by additional or subsequent agreement, the defendant's intestate promised to pay the plaintiff a further compensation, that question was open for the consideration of the jury.

In an action by an attorney for compensation for professional services upon a *quantum meruit*, it is not competent for the plaintiff to offer evidence as to what sum was paid to, or demanded by, any attorney in particular, for like services. The usual and customary compensation for services of the like kind, is admissible evidence; but what was paid to any particular individual, standing *per se*, is inadmissible. *Per Prince George's county court—affirmed by a division of this court.*

The common law of *England*, in relation to fees of counsellors at law, is inapplicable to the *State of Maryland*. In a *quantum meruit*, they may recover for professional services rendered.

A defendant below, cannot assign for error (when appellant,) the results of any of his own modifications or additions to the prayer of the plaintiff below. If there be any error for which a judgment in this case should be reversed, it must be found in the addition made by the plaintiff to the instruction as modified and amended at the defendant's instance.

It is error in the county court to instruct a jury absolutely, though they might have been authorised to grant the same instruction hypothetically.

Where the proof is wholly oral, of the credit due to which the jury only are competent to decide, the court should not decide the matter of fact, and so withdraw from the jury the credibility of the witnesses and the truth of their statements.

### APPEAL from *Prince George's County Court*.

This was an action of *Assumpsit*, commenced by the appellee against the appellant, on the 7th February 1837, to recover the value of certain professional services as an attorney and counsellor at law, rendered by the appellee to the testator of the appellant, and at his special instance and request.



At October term 1837, the defendant pleaded non-assumpsit, on which issue was joined.

At the trial of the cause, the plaintiff offered in evidence the proceedings under a commission which issued on the 17th October 1838, which was rejected by the county court. The plaintiff excepted, but as the appeal was only taken by the defendant, that exception was not reviewed by this court.

1ST EXCEPTION. At the trial of this cause, the plaintiff to maintain the issue on his part, offered to read to the jury the depositions taken under the following commission, which issued on the 23rd July 1839, and returned on the 6th April 1840, which is as follows:

PRINCE GEORGE'S COUNTY, *Sct.* *The State of Maryland to Joseph H. Bradley, Philip R. Fendall, James M. Carlisle and James Hoban, of the District of Columbia, gentlemen, greeting:* Be it known that you are appointed commissioners to examine evidences in a cause depending in *Prince George's* county court, between *Richard S. Coxe*, plaintiff, and *Charles B. Calvert*, executor of *George Calvert*, defendant. Therefore you are requested, (having first taken the oath hereunto annexed, and also administered the annexed oath to the person whom you shall appoint as clerk to attend the execution of this commission,) that at such time and place as to you shall seem convenient, you cause to come before you, all such evidences as shall be made or produced to you, either by the plaintiff or defendant; and that you examine them upon their corporal oaths, &c.; and that you cause notice to be given to the parties or their attorneys, of the execution of this commission, before you execute the same; and, &c.

*Interrogatories to be administered to Thomas Swann, Esq., a witness to be examined on the part of the plaintiff.*

1st. Do you know the above named parties, or either, and which of them.

2nd. Do you know whether the said plaintiff was employed as counsel by *George Calvert* in a certain case touching the validity of a supposed will of the late *Thomas Cramphin*, de-

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Calvert vs. Coxe.—1843.

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ceased, which was contested by a certain *Mrs. Davis*, and during his life time by her husband.

3rd. In what court or courts was such suit pending.

4th. State as fully as practicable the nature, extent and value of the services rendered by said plaintiff to defendant's testator.

5th. How frequently, and for what length of time was said plaintiff so occupied and employed as counsel in said controversy at *Rockville* and *Annapolis*, in the orphans court, county court and Court of Appeals.

6th. In what manner was said controversy finally settled.

7th. State any thing further material to the plaintiff's case.

THOMAS G. PRATT, for *R. S. Coxe*.

True copy—Test, AQUILLA BEALL, *Clk.*

WASHINGTON, 11th November, 1839.

CHARLES B. CALVERT, Esq., *Executor of George Calvert, deceased.* Sir,—Notice is hereby given to you, that on Saturday next, the 16th inst., between the hours of twelve at noon and six in the afternoon, at the dwelling house of *Thomas Swann, esquire*, near the town of *Leesburg*, in the county of *Loudoun*, in the State of *Virginia*, we shall proceed, by virtue of a commission from the State of *Maryland*, to us directed, to take the depositions of the said *Thomas Swann*, and such other witnesses as, &c., &c. And that on Monday next, the 18th inst., between the hours of ten in the morning and six in the afternoon, at the office of *Joseph H. Bradley*, one of us, in the city of *Washington*, in the *District of Columbia*, we shall proceed, by virtue of the commission aforesaid, to take the depositions of, &c., and that at the said several times and places you may attend, if you think proper.

Yours, respectfully, JOS. H. BRADLEY, &c.

The plaintiff acknowledged service of the notice on him 12th November 1839, and there was proof of service of same on the defendant, by leaving it at his residence on the 11th November 1839, by an affidavit made before the commissioners.

At the execution of a commission, issued, &c., directed to *Messrs. Joseph H. Bradley, &c.*, empowering them to examine

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evidence in a cause, &c., we the said *Joseph H. Bradley, &c.*, in the said commission named, having met on the 16th day of November 1839, at the house of *Thomas Swann, esquire*, in the county of *Loudoun* and State of *Virginia*, pursuant to notice, and taken the oath to the said commission annexed, proceeded to take the deposition of *Thomas Swann, esquire*, which is reduced to writing, and transcribed by *Robert Ould, junior*, who was appointed clerk by the said commissioners, and took the oath prescribed for such clerk, and to the said commission annexed.

The said *Thomas Swann*, of lawful age, being first sworn, &c., to the *first* interrogatory—He knows both.

To the *second* he answers—Yes.

To the *third* he answers,—The suit was first pending in the orphans court of *Montgomery county, Maryland*; the issues were tried in the county court of said county, and the cause was afterwards carried to the Court of Appeals of *Maryland*.

To the *fourth, fifth, sixth* and *seventh*, he answers,—Some time previous to the first trial of the issues in *Montgomery* court, upon *Mr. Cramphin's* will, I met the late *Mr. George Calvert* in one of the streets in *Washington*, and he stopped me and told me he wished to engage me in the contest which was about to take place in relation to this will; I said to *Mr. Calvert*, that I had understood that he had already engaged counsel in that case, and that I did not wish to interfere with my brethren in their professional engagements; he said that he had fixed upon or first engaged *Mr. Key* and *Mr. Forrest*, to act as his counsel, but that a misunderstanding had taken place between them, and that he had determined to have nothing more to say to them. I asked if nothing could restore the breach between them, and as they knew more about the case than a stranger, it would be better to adhere to them if possible. He told me he had made up his mind to have nothing more to say to them, and that if he could not get counsel here, he had decided to go to *Baltimore* and get counsel there. I then said, that if that was the case I could see no objection



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in undertaking the case for him, and that I would think about it, and let him know when I saw him again. I asked *Mr. Calvert*, what sort of a case it was; whether there would be any difficulty in establishing the will; he said that he knew of no difficulty in the case, and I was under the impression that the trial would be a short one. *Mr. Calvert* asked me, if I should consider a thousand dollars a sufficient compensation to try this case before the jury, and I said it would, being persuaded from his representation at the time, that the labor would not exceed a week. *Mr. Calvert* and myself parted, and before I saw him again, I saw *Mr. Dunlop* of *Georgetown*, who I understood was to have been engaged with *Mr. Key*, in the contest respecting this will. I asked *Mr. Dunlop* if their engagement with *Mr. Calvert* had been broken off; he told me it had. When I saw *Mr. Calvert* again, I told him I would undertake his cause for him, and would argue his issues before the jury for the thousand dollars which he had proposed to give. In this engagement I did not consider myself bound to go beyond the jury trial, and expressed this opinion repeatedly after the engagement. *Mr. Calvert* mentioned to me, that assistant counsel would be necessary, and asked me how I should like *Mr. Coxe*; I told him very well, and he promised that he should be engaged. I am not certain, but it is probable he requested me to engage him. I well recollect applying to *Mr. Coxe*, and stating to him the nature of my engagements, and assuring him, that he should be put on the same footing with myself. He consented to join me upon these terms. In this first engagement, I considered the fee of one thousand dollars as a certain fee, to be paid at all events. The impression then was, that the orphans court would allow it, whether we should succeed or not, but at all events we were to have it. Before however we entered upon the trial, we made a change in our contract; we agreed to take a contingent fee of two thousand dollars, in the event of success, and in case we did not succeed, to take our chance of getting what we could from the orphans court. I had little expectation from the orphans court, and always looked to our success

in the verdict as the only chance of payment. We did succeed in this verdict, after a most troublesome trial of about twenty days, and *Mr. Calvert* paid us over two thousand dollars a piece. And so the engagement, as I certainly supposed, was at an end. At the time that this verdict was obtained, there was no law, as I understood, that would authorise the taking of this case to the Court of Appeals; but some short time afterwards a law was passed authorising an appeal, and the case was removed to the Court of Appeals under this new law. When it was about to come on in that court, *Mr. Calvert* sent me a message, requesting that I would attend the trial in the Court of Appeals. I felt some reluctance about going, never having been in the *Maryland* Court of Appeals before. I determined however to go, and left my farm in *Loudoun*, and went to *Annapolis* and made the argument in the case. *Mr. Coxe* was there also and assisted in the argument, and so did *R. Johnson, esquire*. *Mr. Calvert* was there also. I think we spent about a week in the argument. Nothing was said about compensation in this trial. *Mr. Coxe* wished an understanding about it, and I begged him not to press it, saying that *Mr. Calvert* would do what was right. The Court of Appeals set aside the verdict, and the cause was sent back for another jury trial. This decision opened a new course of labor, not in the contemplation of any of us, and not provided for in our original agreement. When the cause came back for another jury trial, we were all aware of the trouble which would attend it. *Mr. Calvert* saw and conversed with me about the further trial of the cause; he said to me, "you must see it out; I have made considerable advancements out of my own personal funds to carry on this controversy, and can go no further, but go through the business, and I will do you justice, liberal justice. If I get possession of the estate, you shall have no cause to complain." I thought he was right in this course, and agreed to go through the business, and to let my compensation depend upon his getting possession of the estate. *Mr. Coxe* asked me several times, what he was to have for his further services, and I informed

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him what had passed between *Mr. Calvert* and myself, and expressed my wish, that he should fall into this arrangement, and he agreed so to do, and we went through this business with this understanding. We had another jury trial of about twenty days, in which the jury did not agree, and we attended another after that of nearly twenty days; besides this, we repeatedly attended the court to press the trial, and prevent the further continuance of the case. In the course of the last trial, *Mr. Calvert* compromised the case, mostly through the agency of *Judge Kilgour*. I was opposed to the terms, thinking the sum which *Mr. Calvert* had agreed to pay too high; but as slaves then were very high, and there was always a doubt about the jury's verdict, I acquiesced in the arrangement of compromise, and *Mr. Calvert* got possession of the estate. *Mrs. Davis* executed a deed to carry this compromise into effect, and in that deed provision was made to re-imburse to *Mr. Calvert* the money which he had advanced, and for what further moneys he might advance on account of this estate. This provision in the deed was made, among other things, to cover any further compensation that he might make to his counsel for their further services. When this business was ended, *Mr. Coxe* claimed his further compensation. I told him *Mr. Calvert* was a particularly tempered man, and perhaps if I dunned him he might take offence, and that I expected he would apply to me, and as soon as he did I would let him know. *Mr. Calvert* did not apply, and believing that he did not mean to do so, I mentioned the subject to him. He said he would never advance another cent without the sanction of the court, but referred me to his son *Charles*, who would act for him in the matter. I accordingly applied to his son, and he repeated what his father had said. I told him we should be content to take what the court should say was reasonable, but afterwards, perhaps the next day, he said his father was not content to leave it to the court. I then proposed to make a friendly case, and to leave it to the jury; he said his father would not be ready to try it at the first term. I told him he could take further time if he wished, upon which



he said he could see no objection to this, and that he would see his father and let me know. In a day or two after I saw him, and he told me his father would not consent to this, and I think on the same day I saw *Mr. Calvert*, and he said "he would not consent to leave it to the court or jury." I asked him what then was to be done. Upon the footing which we had stood, and the respect I had for him, I could not send a sheriff after him; he said, &c. The two thousand dollars herein mentioned, were paid to me, and the same sum to *Mr. Coxe*, for services rendered and past at the time of such payment, and were not in any sense advanced or in consideration of services to be rendered, but wholly in fulfilment of the original agreement, which had been satisfied on our part, before the first verdict in the cause. As to the value of the services, I always supposed that as our labors upon the subsequent jury trials were much greater than those performed by us upon the first trial and previous thereto; and as *Mr. Calvert* himself had estimated the value of such services, up to and inclusive of said trial at \$2000, we were justly entitled to a similar sum for said subsequent services, and likewise to an additional compensation of \$500 each, for the argument in the Court of Appeals. I have been in the profession of the law upwards of forty years; I have never been considered immoderate in my charges, and my brethren have frequently complained of me, as being too low in my charges. From the amount in controversy in this case, the number of days spent by us in prosecuting it, and the peculiar character of the cause itself, I consider \$2,500 each, as a very moderate fee for the services rendered by us subsequent to the first verdict. *Mr. Coxe* often said, that he expected *Mr. Calvert* would give us more than that sum, but I told him I doubted it; yet, that to the extent of \$2,500 each, I had no doubt he would go. *Mr. Calvert*, in stating to us in advance, the nature and extent of the services required of us, always much depreciated them, telling us that it was a plain case, and would require no great exertion. We found it however very much the contrary, and one of the most laborious causes that I had ever tried. And further the said deponent saith not.

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And we, the said commissioners, do further certify, that pursuant to the said notice to the parties to the said suit, which is hereunto annexed, we did, on Monday the 18th day of November, 1839, meet between the hours of ten in the morning and six in the afternoon of that day, at the office of *Joseph H. Bradley*, one of us, in the city of *Washington*, in the *District of Columbia*, and that some one or more of us was in the said office from the said hour of ten o'clock in the morning until six in the afternoon of that day, and that no other witness was produced by either of the parties before us. And we do herewith return the said commission, interrogatories, notice and depositions to the honorable the judges of the said court, under our hands and seals.

JOS. H. BRADLEY, &C. &C., *Commissioners*.

The plaintiff then gave in evidence the following proceedings in this cause upon his motion for a commission, viz:

RICHARD S. COXE vs. CHARLES B. CALVERT, Ex'r of Geo. Calvert. In *Prince George's* county court.

*Commissioners in the Case. Joseph H. Bradley, Philip R. Fendall, James M. Carlisle and James Hoban, of the District of Columbia.* Let the commission issue as prayed.

May 27, 1839.

C. DORSEY.

Interrogatories to be administered to *Thomas Swann, esquire*, a witness to be examined on the part of the plaintiff.

Then followed the interrogatories Nos. 1 to 7, as set forth under the commission, which were signed by the plaintiff's counsel and dated 27th May 1839.

To the reading of this evidence the defendant by his counsel objected.

1st. Because the said commission issued irregularly.

2nd. Because the commissioners therein named had no right to execute the same in the State of *Virginia*.

3rd. Because the said commission could not be executed at a private house.

4th. Because the commission did not appear to have been executed at the time and place mentioned in the notice, and

5th. Because the time allowed by the notice to the defendant was too short.

But the court (STEPHEN, C. J., and DORSEY, A. J.,) overruled the said objections and permitted the said deposition to be read to the jury, which was accordingly read; to which opinion of the court, overruling the said objections and permitting the said deposition to be read to the jury, the defendant excepted.

2ND EXCEPTION. After the evidence offered in the preceding exceptions, and which by agreement shall constitute a part of this exception, and after the court had decided that the objections urged by the defendant to the reading of the deposition taken under the commission, which issued on the 23rd of July 1839, were insufficient to exclude it from the jury, the defendant by his counsel, (when the counsel of the plaintiff was about to read the said deposition to the jury,) objected to the following portions of the said deposition:

1st. To that portion of the said deposition which is contained within brackets, commencing with the word "In" and ending with the word "engagement." ["In this engagement I did not consider myself bound to go beyond the jury trial, and expressed this opinion repeatedly after the engagement."]

2nd. To that portion of said deposition on the same page in the brackets, commencing with the word "In" and ending with the word "events." ["In this first engagement I considered the fee of \$1,000 as a certain fee, to be paid at all events."]

3rd. To that portion of said deposition on the same page in the brackets, commencing with the word "And" and ending with the word "end." ["And so the engagement, as I certainly supposed, was at an end."]

4th. To that portion of said deposition in the brackets, commencing with the word ["Mr." and ending with the word "right."] ["*Mr. Coxe* wished an understanding about it, but I begged him not to press it, saying that *Mr. Calvert* would do what was right."]



5th. To that portion of said deposition in brackets, commencing with the word "Mr." and ending with the word "understanding." ["*Mr. Coxe* asked me several times what was he to have for his further services, and I informed him what had passed between *Mr. Calvert* and myself, and expressed my wish that he should fall into this arrangement, and he agreed to do so, and we went through the business with this understanding."]

6th. To that portion of the said deposition in the brackets, commencing with the word "And" and ending with the word "services." ["And in that deed provision was made to reimburse to *Mr. Calvert* the money which he had advanced, and for what further moneys he might advance on account of this estate. This provision in the deed was made among other things to cover any further compensation that he might make to his counsel for their further services."]

7th. To that portion of said deposition on the same page in the brackets, which commences with the word "When" and ends with the word "know." ["When this business was ended, *Mr. Coxe* claimed his further compensation. I told him that *Mr. Calvert* was a particular tempered man, and perhaps if I dunned him him he might take offence, and that I expected he would apply to me, and as soon as he did I would let him know."]

8th. To that portion of the said deposition included in the brackets, which commenced with the word "The" and ends with the word "cause." ["The two thousand dollars herein mentioned were paid to me, and the same sum to *Mr. Coxe*, for services rendered and past at the time of such payment, and were not in any sense advanced or in consideration of services to be rendered, but wholly in fulfilment of the original agreement, which had been satisfied on our part before the first verdict in the cause."]

9th. To that portion of the said deposition in the brackets, which commences with the word "I" and ends with the word "charges." ["I have been in the profession of the law upwards of forty years; I have never been considered immod-

erate in my charges, and my brethren have frequently complained of me as being too low in my charges.”]

10th. To that portion of the same deposition which commences with the word “Mr.” and ends with the word “go.” [“*Mr. Coxe* often said that he expected *Mr. Calvert* would give us more than that sum, but I told him I doubted it, yet that to the extent of \$2,500 I had no doubt he would go.”]

The court sustained all the objections made by the counsel of the defendant to the said deposition, except to that portion of the latter clause of the first part excepted to on the 5th page, which in the clause commences with the word “this” and ends with the word “services.” See the 6th objection above. That portion of the said deposition the court (STEPHEN, C. J. and DORSEY, A. J.) decided to be admissible, and suffered the same to be read to the jury. The plaintiff excepted to so much of the opinion of the court as excluded the other portions of the deposition objected to.

The counsel of the defendant excepted to that part of the court’s opinion under which the aforesaid part of the said deposition, commencing with “this” and ending with “services” was admitted.

3RD EXCEPTION. In the trial of this cause, and in addition to the testimony before offered, and which it is agreed shall be considered a part of this exception, the plaintiff to maintain the issue joined on his part, offered proof, that in a former trial of this case, a certain *Benjamin S. Forrest* was examined as a witness, and that the said *Forrest* is since dead; thereupon, the plaintiff offered to prove by a competent witness, who was present at the time of the trial, what facts were proved by the said *Forrest* as a witness; and during his examination in the cause, the defendant by his counsel objected to the admissibility of said proof, but the court admitted it, and suffered the evidence to be given to the jury; to which opinion of the county court, admitting the said evidence, the defendant excepted.

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4TH EXCEPTION. At the trial of this cause, after the evidence contained in all the preceding exceptions had gone to the jury, which by agreement shall constitute a part of this exception, the defendant, to maintain the issue joined on his part, proved to the jury by a competent witness, that he the witness, as the agent of the defendant's testator, on the 12th December 1832, shortly after the first trial in *Montgomery* county court, of the issues growing out of the will of *Thomas Cramphin*, deceased, and which were sent by the orphans court of the county to be tried in the said county court, which trial resulted in a verdict in favor of the will, paid the sum of \$2,000 to the plaintiff; that on the day the money was so paid, *Thomas Swann, Esq.*, and *Z. C. Lee, Esq.*, who were also employed as counsel for said *Calvert*, (together with the plaintiff,) called at the office of the witness, when the said *Swann*, after an examination of the law upon the subject, said the case affecting the validity of said will was finally settled by the said verdict; that the defendant's intestate was also present, and that thereupon after the expression of the said opinion by the said *Swann*, he the said *Swann* and the said *Lee* asked the said *Calvert* for the fees which had been respectively promised to be paid to them, telling him he would soon be able to get it out of the estate of said *Cramphin*; that the said fees were accordingly paid to them, and on the same day the sum of \$2,000 as aforesaid was paid to the plaintiff as his fee. And the defendant then read in that connexion a letter from the plaintiff to the said *Swann*, dated the 16th February 1836, which is as follows, to wit:

*Dear Sir,*—On examining your draft of a letter to *Mr. Calvert*, it occurs to me to make a suggestion or two as matters of fact. In the first place the entire arrangement was made between *Mr. Calvert* and yourself. I was confined to my bed by a severe fit of illness, and unable to enter into the merits of the controversy, or to estimate the amount of compensation, and equally unable to investigate the question, which I deemed a preliminary one, viz: whether the circumstances which had led to the separation of *Mr. Calvert* from his former counsel were such as to permit us to assume their position without a viola-



of professional courtesy. This situation induced me to repose the whole matter to you.

In consequence of this arrangement I have had no personal understanding with *Mr. Calvert* on the subject. Your first information was that *Mr. C.* would pay us \$1,000 each, for the trial of the issues, without any contingency, it being the opinion of all of us, that it was *Mr. Calvert's* right and duty to defend the case, and that his expenses would be allowed him by the orphans court out of the estate, whatever might be the final result. In this state of things, *Mr. Lee* and myself attended at *Montgomery* for the purpose of having the issues amended. Before I was able myself to attend, they had been prepared. We did not succeed, and our proposed amendments were disallowed. Between this time and the trial we learned that the orphans court would not allow *Mr. C.* his expenses if the will should be set aside. And you then apprised me that *Mr. Calvert*, fearful of committing himself personally, had suggested a change in the terms of our arrangement, and preferred giving us \$2,000 in case we succeeded, to \$1,000 absolutely. Concurring with him in his views, we both acceded to this modification of the contract. We tried the issues, succeeded, and the fee was paid as had been agreed. At this time every one believed the cause was terminated. There was no act of the legislature allowing an appeal, and none could be taken. During that winter a law was obtained authorising an appeal to be taken, and the cause was carried to the Court of Appeals. We attended and argued the cause without anything passing between *Mr. Calvert* and myself personally on the subject of compensation, but with a distinct understanding on your part and mine that we were to be paid, and I had made up my mind, and I believe you also, that we would endeavor to obtain an allowance from the funds of the estate to re-imburse *Mr. Calvert*. The same thing occurred at the several terms when we were at *Montgomery* to try the issues; three or four times I believe.

When the compromise was arranged, the clause providing for the re-imbursement of moneys already and thereafter to

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be paid was introduced to protect *Mr. C.* from every difficulty, and you may remember the particular phraseology I employed in my draft, leaving *Mr. C.* free to exercise his own discretion on the subject.

My position in the cause prevented me from making any arrangement with *Mr. C.*, considering myself as having reposed that in your hands, fully satisfied to confirm any arrangement you might make; but you always stated that we should be fully and liberally compensated if *Mr. C.* should succeed; and if he failed we would endeavor to obtain remuneration for him and compensation to ourselves through the orphans court. If I had entertained any difficulty on the subject it would have been removed by a remark which *Mr. C.* made in my presence, that his objection to paying his former counsel did not arise from any question as to the amount to be paid to such of them as he had wished to be employed, but there were too many of them, some whom he did not want. This I considered as a pledge that we should each receive for our services in the will cause, at least as much as the counsel were each to receive under that arrangement.

In reference to the other matters; the suit against *Mr. C.* by his former counsel; the claim of *Forrest*; the attempt to revoke the letters of administration, I considered them as wholly independent of this original understanding, and to be the subject of distinct charge.

The foregoing may suggest some views of the matter worthy your attention.

Very truly yours,

Feb. 16th, 1836.

RICH'D S. COXE.

P. S. I may as well mention, that the views I had taken of the subject were confirmed by every conversation with *Caroline* and her children, all of whom professed themselves willing and desirous that we should be paid far beyond the amount asked by the former counsel, and who, I have no doubt, would now approve of such a course.

Thomas Swann.

R. S. C.

And he further proved, that the plaintiff had told the witness that the said *Swann* had made the contract for the fee,

and had authority from him the plaintiff for that purpose. And the defendant further proved by the said witness, that he had heard the said *Swann* say that the original contract made by him with the said *Calvert*, upon the subject of fees to be paid him and the said plaintiff, was that they were each to receive a certain fee of \$1,000 each; that this contract was subsequently changed, and instead of the said certain fee, they were to have each the sum of \$2,000, in the event of their succeeding in obtaining a verdict in favor of the will; and upon the defendant's testator, who was named as executor and trustee in said will, getting thereby the possession of the estate of the said testator, that the said sum of \$2,000 to the said *Swann* and the plaintiff, was to be paid contingently upon the said defendant's testator getting possession of the estate of the said *Cramphin*, and to be paid out of the estate.

The defendant then prayed the court to give the following instructions to the jury:

1st. Upon the evidence, the defendant by his counsel prayed the court to instruct the jury, that if the jury shall find that the compensation claimed by the plaintiff of the defendant was according to the agreement of the parties, to be paid out of the estate of the said *Thomas Cramphin*, in the hands of the said *George Calvert*; if the jury shall find that such agreement was made, then the plaintiff is not entitled to recover the same from the present defendant, the personal representative of the said *George Calvert*, and the verdict of the jury must be for the defendant.

2nd. If the jury find from the evidence that the sum of two thousand dollars, which was paid to the plaintiff on the 12th December 1832; if the jury find it was paid, was according to the contract between the parties to be paid upon the contingency of the final decision of the cause in favor of the will of *Thomas Cramphin*, then the plaintiff was entitled to no additional compensation, and the verdict of the jury must be for the defendant.

But the court, (STEPHEN, C. J., KEY and DORSEY, A. J.,) refused to give the instructions prayed by the defendant's counsel, and instructed the jury as follows:



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If the jury find from the evidence that the sum of two thousand dollars which was paid to the plaintiff; if the jury find it was paid, was according to the contract between the parties, to be paid upon a finding of the issues by the jury in favor of the establishment of the will in *Montgomery* county court, and that such issues were found by the jury in favor of the will, either of their own accord and free will, or by direction of the parties under a compromise, after the cause had been carried to the Court of Appeals and sent back for a new trial under a *procedendo*, that then the defendant's intestate was personally bound to pay the stipulated contingent fee of two thousand dollars, and such additional compensation as the jury may find the plaintiff's professional services were worth for trying and conducting the case in the Court of Appeals.

If the jury shall find from the evidence that the compensation claimed by the plaintiff from the defendant was to be paid in the event of the jury finding a verdict upon the issues in favor of the establishment of the will, in which the defendant's intestate was appointed executor, and that the verdict was found by the jury in favor of the will, either of their own free will and accord, or by the direction of the parties under a compromise, that then the defendant's intestate was personally bound to make the compensation stipulated, and the defendant is answerable for the same, if it has not been paid.

To the giving of which instructions, and to the refusal of the court to give the instructions as prayed by the defendant's counsel, the defendant excepted.

5TH EXCEPTION. After the evidence in the preceding exceptions had gone to the jury, and which it is agreed shall form a part of this exception, the defendant, for the purpose of enabling the jury to estimate the value of the plaintiff's services for the argument of the case affecting the validity of the will of *Thomas Cramphin* in the Court of Appeals, and for the purpose of showing that the jury might not allow as much therefor upon the *quantum meruit*, as the estimate placed thereupon by other witnesses examined in the cause on the part of the plaintiff, offered to prove by a competent witness, that

*Reverdy Johnson, Esq.*, an attorney of the Court of Appeals, argued the same case there, together with and as an associate of the plaintiff, and then was about to prove by the same witness the amount of the fee which the said *R. Johnson* received from the defendant's testator for the said argument in the Court of Appeals, as a circumstance to assist the jury in fixing the amount of compensation to be allowed the plaintiff for the same service. But upon an objection made to the said proof by the plaintiff's counsel, the court would not suffer it to go to the jury; and to the refusal of the court to suffer the said evidence to go to the jury, the defendant excepted.

6TH EXCEPTION. Upon the testimony stated in the several bills of exceptions, and which it is agreed shall be a part of this exception, the defendant by his counsel prayed the court to instruct the jury, that if the jury should be of opinion from the evidence, that by the terms of the contract between the plaintiff and defendant, the plaintiff was bound to prosecute to a successful issue the controversy then pending in the orphans court of *Montgomery* county, and has been paid the two thousand dollars, the contingent fee, then the plaintiff is not entitled to claim any further compensation for his services proved to have been rendered as aforesaid in the Court of Appeals, but the court refused to give the instruction asked as aforesaid; to which refusal the defendant excepted.

7TH EXCEPTION. In the further progress of this cause, and after the evidence in the previous exceptions had gone to the jury, which by agreement shall make a part of this exception, the plaintiff further to maintain the issues joined on his part, proved by *Z. C. Lee, Esq.*, that he was one of the counsel employed by the testator of the defendant, to defend the will of the late *Thomas Cramphin*. That according to the original contract between the said defendant's intestate and his counsel, consisting of himself, *Mr. Swann* and the plaintiff, the said *Swann* and the plaintiff were each to receive a certain fee of \$1,000, and the witness a similar fee of \$750. That this contract was subsequently changed, and that by the substituted contract, *Mr. Swann* and the plaintiff was each to receive

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\$2,000, contingent upon the event of the finding of a verdict by a jury in favor of the will, and that the witness was to receive a fee of \$1,500, contingent upon the same event.

And the plaintiff further proved that at the November term of the *Montgomery* county court, a jury of that county found a verdict in favor of the will; that there being at that time no law which authorised an appeal to the Court of Appeals, by which the opinions pronounced by the county court in the progress of the said trial, could be revised, although exceptions were taken by the parties to many of the opinions of the court; that immediately upon the rendition of the said verdict, a motion was made by the parties who contested the will for a new trial, which motion was not disposed of during the then term of the county court, which closed the day after the verdict, and which was not disposed of when the Act of Assembly of 1832, ch. 208, was passed by the legislature.

The plaintiff then further offered evidence, that though the motion for a new trial was not disposed of when the said law passed, yet according to the recollection of the witness, it was disposed of and overruled by the county court before the case was carried to the Court of Appeals. And it was further proved, that the case was carried to the Court of Appeals, and the judgment of the county court reversed by the Court of Appeals at June term 1833.

And thereupon the following instructions were prayed by the counsel of the respective parties:

The plaintiff asked the following instructions to the jury:

If the jury shall believe from the evidence that the contract as existing between the plaintiff and the defendant's testator, in November and December 1832, was that the said plaintiff was to receive from the said testator the sum of two thousand dollars, as a fee in case the verdict of the jury should be in favor of the will on the issues then pending in *Montgomery* county court, and that the verdict of the jury was in fact in favor of the will on said issues, and the said sum of \$2,000 was then paid to the plaintiff by the defendant's testator, in fulfilment and execution of said contract, and that said plaintiff subsequently



rendered other and further services for said defendant's testator, at his instance and request, for which he has not been compensated, then the jury may find for the plaintiff such amount as they shall believe from the evidence the plaintiff reasonably deserved to have for such compensation.

The defendant by his counsel objected to the court's granting the said instructions, but prayed the court, in case they should grant the same, to add thereto the following modification:

That if the jury should find from the evidence, that the contract between the plaintiff and the testator of the defendant, upon which the sum of \$2,000 was to be paid, only entitled the plaintiff to receive the said sum upon obtaining such a verdict in favor of the will, as would procure its admission to probate in the orphans court, then the plaintiff was not entitled to the said sum of \$2,000, until such a verdict was rendered; and the plaintiff in that event can only recover such reasonable compensation as the jury may think he was entitled to, for the argument of the case in the Court of Appeals.

To this modification the plaintiff moved the following addition, but that as the law stood, at the time of the making of the said contract and its execution by the parties respectively, no appeal or writ of error was allowed to the Court of Appeals, and that the law subsequently passed in 1832, gave for the first time a right of appeal, under and in consequence of which, the said verdict and judgment thereon was reversed and set aside by the Court of Appeals, and that independently of said law, said verdict was a final termination of said issues, then the contract between the said plaintiff and the defendant's testator, is to be expounded with reference to the law as it stood when it was made by the parties, and the services imposed on and performed by the plaintiff in consequence of said law, and subsequent to its passage, at the instance and request of defendant's testator, are not within the contract and provided for by it.

To which the defendant moved this further addition, "that if the jury find, that at the time the sum of \$2,000 was paid the plaintiff, the motion for a new trial had not been disposed of, then the verdict referred to was not a final verdict."

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And to this, the plaintiff moved this further addition, that the said verdict became a final verdict afterwards, and before the appeal was taken to the Court of Appeals.

The court gave these instructions, with their several modifications and additions; and to the giving of each and all of them, with their several modifications and additions, the defendant excepted.

The jury found a verdict for the plaintiff in the sum of \$2,000, and the defendant appealed to this court.

The cause was argued before ARCHER, DORSEY, CHAMBERS and SPENCE, J.

By J. JOHNSON and A. C. MAGRUDER for the appellant, and  
By REVERDY JOHNSON and T. G. PRATT for the appellee.

ARCHER, J., delivered the opinion of this court.

I am directed by the court to say that they approve of the opinion expressed by *Judge Dorsey* on all the exceptions in this case, except on the *third* and *fifth* exceptions of the appellant.

I am further directed by a majority of the court on the third exception, to say that they think the court below were right in the opinion by them expressed in this exception.

This court has, heretofore decided, that facts proved on a former trial by a deceased witness are admissible on a second trial of the same case. They would only be rejected on the presumption, that facts were proven on the first trial which were inadmissible as evidence. This we think we cannot intend; but the reasonable presumption is, that such facts were alone proved as were admissible, and it was proper the court should act on this presumption, upon the offer of the evidence, until the contrary appeared.

On the *fifth* exception the court are divided. Those of us who maintain that the evidence offered as to what sum was paid to *Mr. Johnson* was inadmissible, think that what was paid to or demanded by one attorney, was not evidence in the cause. We cannot judicially know the standing of any one member of the bar, or the circumstances under which he was paid, or demanded a given sum for his services. What is the

usual and customary compensation for services of the like kind is admissible testimony, but what was paid to any particular individual, standing *per se*, is in our opinion inadmissible.

DORSEY, J., delivered the following opinion:

Differing in opinion with a majority of the court on some of the bills of exceptions, I proceed to state my own views of this case.

Whether the court below erred or not, in rejecting the testimony taken under the first commission issued in this cause, is a question not before us for decision, on the present appeal.

Our first inquiry is, was there error in the county court's admitting the testimony under the second commission, to go to the jury? For its rejection various reasons have been assigned; as well in respect to the time and manner of its issue, as of its execution. It is asserted in the argument for the appellant that it was ordered on the same day that it was applied for; and that no opportunity was given to the appellant to name and strike commissioners. If this assertion be true, it does not satisfactorily appear to me by the record before us. The proof of what transpired in the court below in relation to the issuing of the second commission is not presented to us, as it is in relation to the first. In regard to the latter, it was proved by competent testimony, that it was applied for by the plaintiff on the 17th of October, 1838, and that on the same day it was ordered to four commissioners named by the plaintiff. But as to the second commission; of the day on which it was applied for; of the number of days which intervened between such application and the naming of commissioners by the plaintiff; and the order for the issuing of the commission, the record furnishes us no definite information. All that we can there learn upon the subject is, that *Prince George's* county court sat on the first Monday of April, 1839. That the return to the first commission was made to it at that term; and that a jury was then sworn, and a juror withdrawn; and "whereupon" it was "ordered by the court, on motion of the plaintiff by his counsel, that commission issue to take depo-



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sitions in this cause, directed to *Joseph H. Bradley, Philip R. Fendall, James M. Carlisle and James Hoban, Esquires, of the District of Columbia*, which said commission accordingly issues to the said commissioners, as ordered by the court." Thereupon, &c., the cause was continued. Whether these commissioners were exclusively named by the appellee, or were constituted by both parties having exercised the right of striking, the record gives no means of ascertaining. Nor does the order of the judge upon the subject, furnish any definitive evidence upon this question. After giving the titling of the cause, it is in these words: "Commissioners in the case, *Joseph H. Bradley, Philip R. Fendall, James M. Carlisle and James Hoban, of the District of Columbia*. Let the commission issue as prayed, May 27th 1839." From the length of time which elapsed between the commencement of the term and the date of the judge's order, in the absence of all proof to the contrary, it is fair to presume either that the appellant did name and strike commissioners, or that after reasonable notice he failed to do so, and the phraseology of the order rather repels than sanctions the presumption, that, as soon as the motion was made, the commission was directed to issue to the commissioners named by the appellee. Had such been the action of the court, their order, instead of assuming the shape it did, would have been couched in language like the following: "on motion of the plaintiff ordered, that commission issue to the commissioners by him named." The motion of a suitor seeking a commission to take testimony, is not that a commission issue for that purpose to A, B, C and D, but that a commission issue to take testimony; naming the place to which he wishes it to be addressed. Whereupon the court gives the usual order for naming and striking commissioners. How long this motion was made before the court's order of the 27th of May, does not appear; but in the absence of all proof to the contrary, judicial courtesy requires us to presume, that in issuing this commission the county court discharged its duty according to its rules and practice regulating the exercise of such authority. And in this pre-

sumption we are fortified by the fact, that no proof was offered of the non-conformity of the court in this respect, as was attempted to be shown as regards the first commission. Neither does it appear that at the trial below it was made a distinct ground of objection to the testimony under the second commission, as it was to the first; that "the said commission issued to commissioners named exclusively by the plaintiff, without allowing time to the defendant to name any on his part." As far as this objection is concerned, therefore, I think the county court did not err in permitting the testimony under the second commission to go to the jury.

The next objection to the evidence in question is, that it was executed in the *State of Virginia*, in which the commissioners had no authority to act. And in support of this objection the cases of *Bondereau and al vs. Montgomery and al*, 4 Wash. C. C. R. 186, and *Lessee of Rhoades and Snyder vs. Selin and al* 4 Wash. C. C. R. 715, have been relied on. But those cases are not analagous to that now before this court. There by the terms of the commissions they were to be executed at designated places; and having been executed elsewhere, they were suppressed by the court. In the commission under consideration, there is no designation of the place of its execution. The power of selecting it is confided to the sound discretion of the commissioners, and of its exercise on this occasion, the appellant has no right to complain. That the commission was executed at a private house, detracts nothing from its validity. And in my opinion it does sufficiently appear to have been executed at the time and place mentioned in the notice. In answer to the fifth objection, that "the time allowed by the notice was too short," it has been urged, that this being a foreign commission, no notice to the parties of the time and place of its execution was requisite. And in support of this doctrine, the cases of *Owings vs. Norwood*, 2 Harr. & John. 99, and *Law vs. Scott*, 5 H. & J. 438, have been cited; and I think fully sustain it. In the former of these cases the court decided that "in executing foreign commissions, notice is not necessary; but time should be given, that the opposite party might

exhibit cross interrogatories:" and in the latter it is fully settled that, in executing foreign commissions, no notice of the time and place of so doing need be given to the parties to the suit. All the notice required is, that of the interrogatories sent out with the commission; actual or constructive notice should be given to the opposite party, in time for him to exhibit cross interrogatories before the transmission of the commission. It is true that it is not perfectly obvious that the opinion of the learned judge who decided the case of *Boreing vs. Singery*, is in perfect harmony with the above recited extract from the opinion of the same judge, delivered in the case of *Owings vs. Norwood*. In *Boreing vs. Singery*, the defendant offered in evidence a commission issued at his instance, the return to which, "after setting forth the meeting of the commissioners, and their having taken the deposition of a witness in answer to certain interrogatories," concludes by the commissioners certifying that "the foregoing interrogatories were taken at the instance of *Joshua Stevenson*, on his asserting that the plaintiff had knowledge of his coming and intention of having this commission executed." In support of this statement made to the commissioners, no evidence was offered, and it would appear from the report of the case that no interrogatories were filed and sent with the commission; nor any notice given the plaintiff of the interrogatories propounded to the witness; nor was time or opportunity afforded him of filing cross interrogatories; nor any notice given him of the time and place of executing the commission. Upon the objection being raised to the admissibility of the deposition taken, on the ground that legal notice had not been given to the plaintiff of the time of executing the commission, the learned judge, above referred to, who delivered the opinion of the court below, said, "this case is not similar to the case of *Norwood vs. Owings*. In that case the commissioners certified that they had given notice; but in this case it does not appear, by the return of the commissioners, that they had given any notice, or that proper notice had been given. The court are of opinion, that the commission and return are not legal evidence." That the



court were right in rejecting the testimony offered, is too obvious to admit of discussion. It was affirmed on appeal to this court. It is true the learned judge was mistaken as to a fact which he stated in reference to the case of *Norwood vs. Owings*, viz: that “the commissioners certified that they had given notice.” The return of the commissioners certified no such fact. But in that case the defendant, on whose behalf the commission issued, filed in court his interrogatories, (a copy of which was annexed to the commission,) and ample opportunity was given to the plaintiff to have filed cross interrogatories. In the interpretation given by the counsel of the appellee to the opinion of the learned judge in *Boreing and Singery*, he is perhaps misunderstood. He did not mean, as is imputed to him, to impugn the principle, so distinctly announced by him in the case of *Owings vs. Norwood*, in reference to the execution of foreign commissions; but speaking in reference to the commission before him, where no notice of the interrogatories, or opportunity to exhibit cross interrogatories had been given to the plaintiff; he, in rejecting the testimony, says, “but in this case it does not appear, by the return of the commissioners, that they had given any notice, or that proper notice had been given;” thus it may be inferred, confirming and extending, rather than overruling the doctrine he had so emphatically laid down in *Norwood vs. Owings*, to which he most probably alluded in his alternative reason assigned, “or that proper notice had been given.”

In the case before us, however, notice of the time, place, &c., of executing the commission was given by the commissioners to the appellant; and I do not regard the shortness of the time complained of an adequate ground for suppressing the testimony taken under the commission. In the appellant’s first exception, therefore, I see no ground for reversing the judgment of the county court, rendered in the case before us.

On the second bill of exceptions, I think the county court erred. Having permitted a witness to state the contents or effect and operation of a written instrument, without producing it, notwithstanding the appellant’s objection to the admissibil-

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ity of the testimony. The testimony, thus given, might have had a material influence on the minds of the jury in forming their verdict.

I cannot consent to affirm the act of the county court in admitting, under the circumstances in which it was done, the witness to give evidence of what facts were proved by a certain *Benjamin S. Forrest*, a deceased witness, examined in a former trial of this cause. The testimony being objected to, before the court could determine that it was admissible, it must be satisfied that it was not immaterial and irrelevant to the issue in the cause, of which it was wholly incompetent to judge, without a statement of the facts of which the proof was offered. The objection being overruled, and the evidence admitted without any such statement, I do not see how this court can determine that it was admissible, without knowing what it was. When testimony is objected to, before it can be submitted to the jury, the party offering it, must show its competency, or it must be made appear to the court that it is not immaterial or irrelevant. His obligation to do so, is in no wise changed, by proof of the fact, that it was given in evidence to a jury in a former trial of the same cause between the same parties. Reasons, almost without number, may be assigned, why a party not objecting to incompetent testimony on a first trial, should prefer his objections on the second. His omission or waiver of his rights in a first trial, do not impair or restrain his exertion of them in the second. A principle of striking analogy to that now in question, was decided by the Court of Appeals in the case of *Ragan vs. Gaither*, 11 Gill & John. 472, where the judgment of the county court was reversed, because two deeds referred to in the bill of exceptions were not inserted at length, that the court might judge of their legal effect and operation. By admitting the testimony offered to go to the jury, the court in fact decide that the facts offered to be proved, were pertinent and material to the issue, without the semblance of any knowledge of what the facts were.

I see no sufficient ground for the reversal of the judgment of the county court, either for its refusal to give the defendant's

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instructions as prayed, or for the giving of the court's instructions as set forth in the defendant's fourth bill of exceptions. Notwithstanding the facts put to the finding of the jury by the appellant's first instruction in this bill of exceptions, the jury were not bound to find for the appellant. If the appellant's intestate did contract with the appellee to pay him for his services out of the estate of *Thomas Cramphin*, in the intestate's hands, and failed to do so, his contract was broken; he was personally bound for its performance, and the present action, for the breach thereof, might well be sustained against the appellant, his personal representative. So also as to the second instruction prayed for by the appellant; although the \$2,000 paid to the appellee, was, according to the contract between the parties, to have been paid upon the contingency of the final decision of the cause in favor of the will of *Thomas Cramphin*, yet the jury were not thereby bound to find a verdict for the defendant, because there was other evidence before the jury legally sufficient to warrant them in finding that, by an additional or subsequent agreement between the parties, the appellant's intestate promised to pay to the appellee a further compensation for the services rendered, or a portion thereof. With the two instructions given by the court to the jury in this exception, I see nothing of which the appellant has such ground of complaint as would require of this court the reversal of the judgment.

I cannot concur with the county court in the rejection of the testimony offered by the appellant in his fifth bill of exceptions. No contract for a stipulated compensation for the services rendered having been proved, the appellee's right to recover was upon the ground of a *quantum meruit*. The estimate which the jury, by their verdict, should place on the services for which compensation was sought, was the price at which like services, by counsel of the same eminence, are ordinarily obtained. How then can the value of such services be ascertained so satisfactorily, as by proving what the same party or other persons paid for similar services. Suppose that a witness were produced, who proved that the ordinary compensa-



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tion allowed to such counsel for such services was a specified sum by him stated. Upon what knowledge of facts must his statement, to be evidence at all, be necessarily founded? Why that A, B, C and D, &c., under like circumstances for like services paid, or were required to pay, that, or nearly that sum of money. If then it be admissible to show what others paid, under similar circumstances, is it not competent for the appellant to prove the sum paid by him for services identical, and in the same cause, to other counsel, who, for aught that appears in the record before us, may have been of equal professional ability and eminence with the appellee himself. Indeed the circumstances under which the proffered witness was enlisted in the cause, repel the idea of his great professional inferiority to the appellee, with whom he was associated solely for the purpose of trying the case in the court of last resort. It is not the usage of clients, on such occasions, to call in as associate counsel, a member of the bar of inferior standing to him who tried the cause in the court below. But, if contrary to this usage, the appellant's testator had done so, it was competent for the appellee to have shown it by evidence before the jury.

It has, however, been insisted, that the charges of lawyers are so wholly dissimilar in amount; the value of their services so disproportionate, that the mode suggested of ascertaining the value of their services, is wholly inapplicable. If this be true, the same may be predicated, in a greater or less degree, of all other professions, arts and trades. What other measure of value can you in reason and justice apply to services rendered by counsellors at law. It will not, I presume, be contended, that where no contract for specific compensation has been entered into, the client is bound to pay whatever charge his counsel may see fit to make for his services. When the common law of *England*, in relation to the fees of counsellors at law, was determined to be inapplicable to the State of *Maryland*, and that in a *quantum meruit* they might recover for professional services rendered; that decision necessarily drew with it the standard I have mentioned, for the ascertain-

ment of the value of such services. The materiality and relevancy of the testimony offered, was too obvious to require from the counsel an assurance to the court that it would so appear in the progress of the cause.

I concur with the county court in their refusal of the defendant's prayer for an instruction to the jury, which forms the basis of his sixth bill of exceptions. Although the jury might find that by the terms of the contract the appellee was bound to prosecute, to a successful issue, the controversy then pending in the orphans court of *Montgomery* county, and that the contingent fee of two thousand dollars had been paid to him; yet the county court were not authorised to instruct the jury, that the appellee was not entitled to claim any further compensation for his services proved to have been rendered as aforesaid in the Court of Appeals; because in doing so, the instruction would have excluded, from the consideration of the jury, all the testimony offered by the appellee, to show that the appellant's intestate had promised to make the appellee an additional compensation for his services, besides the contingent fee of two thousand dollars, of which there was testimony offered, legally sufficient to have been left to the jury; and from which the jury might have found the existence of such agreement for additional compensation, if they regarded the testimony sufficient, in point of fact, for that purpose. Such an exclusion of evidence would have been an unwarrantable invasion of the province of the jury, which the court below very properly refused to perpetrate.

To the granting of the plaintiff's prayer, for an instruction to the jury, as it stood in the defendant's seventh bill of exceptions, unmodified by either of the parties, I can see no reasonable ground for objection. And the defendant cannot assign for error, the results of any of his own modifications or additions to the prayer of the plaintiff. If there be error then, for which the judgment should be reversed, it must be found in the additions made by the plaintiff to the instruction as modified and amended at the defendant's instance. And in the adoption of each of those additions I think there is such

error as calls for the reversal of the judgment before us. The first of these additions, (if not so in express terms, would in all probability, have been so understood by the jury,) called on the court to say that for all services performed by the plaintiff, at the instance of the appellant's intestate, in consequence of the act of 1832, granting an appeal from the trial of the issues in *Montgomery* county court to the Court of Appeals, he was entitled to recover of the appellant a reasonable compensation in addition to the contingent fee of two thousand dollars. This addition to the defendant's modification might with propriety have been hypothetically granted by the court to the jury; that is the jury might have been instructed that such was the law, provided they found, as contended for by the appellee, that by the contract between the parties, the contingent fee of two thousand dollars was to have been paid him for his successful trial of the issues then pending in *Montgomery* county court. But suppose the jury had been of opinion, as I have said they had the power to be, that the appellant's version of the contract was the true one; and that the two thousand dollars was only to have been paid upon the successful termination of the controversy about the will, and the appellant's intestate being put into possession of *Cramphin's* estate; could the court then have instructed the jury as required by this first addition to the defendant's modification of the plaintiff's prayer? unquestionably not.

In the grant of the instruction asked for in the plaintiff's second or further addition to the instruction to be given to the jury, the court undertook to decide a matter of fact, which the jury only were competent to determine. The county court, as called on to do by the plaintiff, determined that the motion for a new trial was decided or disposed of by the court, before an appeal was taken to the Court of Appeals. Of this fact, no record evidence was offered; but the proof was wholly oral; of the credit due to which the jury only were competent to judge. In withdrawing from the jury the right to judge of the credibility of the witnesses and the truth of their statements, I think the county court erred.



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I concur with the county court on the appellant's first, fourth and sixth bills of exceptions, but dissenting on the second, third, fifth and seventh, I think, its judgment should be reversed and a procedendo awarded.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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DAVID WHITEFORD vs. CORNELIUS BURCKMYER AND ESTELL  
L. ADAMS.—*December 1843.*

It is a sound rule that before a party can discredit a witness by proof of his having made statements at variance with his testimony, the witness whom it is intended to impeach, should *first* be afforded a full and fair opportunity to recollect, by calling his attention to dates, names, or other attendant circumstances, as connected with the matter about which he is to be charged with having made different statements; but in the matter of the testimony which it is proposed to contradict, or in the manner of arriving at it, a party will not be allowed to violate any positive rule of evidence.

It is not permitted to ask a witness any fact which fancy or idle curiosity may suggest for the purpose of disproving it by another witness; nor is it proper to ask a witness, with the same view, of a fact proper in itself to be proved in the cause, if the only knowledge of such fact has been obtained through a source which the rules of evidence do not recognize as competent.

It is a rule of evidence, subject to very few and well defined exceptions, that a party cannot offer in evidence his own declarations in relation to the subject in controversy.

Where a question proposed to be asked of a witness involves several distinct members, the court is not bound to select from it such members as might be admissible, if unaccompanied by the others with which it is connected, and say that such particular portions of the testimony are proper.

A letter written by the plaintiffs in the cause to a third party, unaccompanied with other proof, is like their verbal declarations to him; and where it was intended to establish that the letter contained a certain enclosure, the party to whom it was addressed, and who received it, being a competent witness, is the best evidence to establish the fact.

In an action by an endorsee against the endorser of a bill of exchange, the drawer is a competent witness to prove that he had received notice of non-acceptance, and his declarations to a third person are not therefore the best evidence of that fact.

Where an agency is established, it is generally true, that an admission of an agent while in the execution of his agency, is admissible to charge his principal.

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To entitle an appellant to a reversal for error in instructions, he must make good all the propositions contained in his motion, however numerous they may be.

The necessity for plain and satisfactory proof as to the *time of service* of notice of non-acceptance, where that is material, has always been insisted on; it may be proved by circumstantial testimony, but the circumstances must point *not to notice at some time*, but to notice on the day when the party had a right to expect and receive it.

Where several witnesses are examined, the testimony of any one of them may be selected from the mass of proof with which it is connected, and made the subject of an instruction.

A party may waive the privilege of claiming notice of protest, as he may any other right which the law has secured to him.

Under an allegation of notice of protest to an endorser in the declaration, the plaintiff may show a waiver of the right by the defendant.

It is the privilege of a party to raise any question of law arising out of the facts of the case, and to demand the opinion of the court distinctly upon it.

If the opposite party believes that other facts not embraced in the hypothesis assumed, are properly calculated to justify an application for other and different instructions, he has the equal privilege of asking an opinion on the additional facts, but not the privilege of controlling and modifying the hypothesis of his antagonist, nor annexing modifications to it against the consent of the party moving it.

Where the holder of a bill of exchange, in Baltimore, sends it to a distant place, as Charleston, S. C., for acceptance, and it is not accepted, the plaintiff, in an action against an endorser, must show presentment for acceptance and refusal, and notice duly transmitted from Charleston to the endorser by mail, or if the notice to the endorser was sent by mail to the holder in Baltimore, that he delivered it within one day after the arrival of such notice in Baltimore, and the burthen of proof is on the plaintiff to show such notice given.

Where the language of an instruction is calculated to bias the mind of the jury upon a contested matter of fact, it is error.

Where the entire and exclusive interest in a bill is vested in the holder thereof, he cannot institute an action upon it in the name of another party.

Possession of a note endorsed in blank will enable the party having it to maintain suit, except *mala fides* be proved.

Courts of justice will never enquire in such cases, whether a plaintiff sues for himself or as trustee for another, nor into the right of possession, unless on an allegation of *mala fides*.

Blank endorsements may be filled up at the moment of trial.

If a bill has been transferred by endorsements, all of them in full, it can only be sued on by the special endorsee.

A bill payable to bearer, or a bill payable to order endorsed in blank, will pass by delivery and bare possession, is *prima facie* evidence of title.

If an agent receive a bill with all the endorsements in full, and the last in full to his principal, the agent cannot sue in his own name, or if the en-

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dorsements are in blank, and he were to fill it up to himself or his principal, it could not be sued on in the name of a stranger.

Since the act of 1825, ch. 35, any holder with a blank endorsement may now sue in his own name, but that act cannot be construed to extend the right of action to one who has no interest in the bill, either as holder or owner. It is a settled principle, that the court will not instruct the jury that there is no evidence of a material fact, if there be any evidence whatever tending to prove it.

An admission of notice by a defendant endorser is evidence, on which the jury may find notice, in due time, and in due form.

An action will lie upon notice of presentment, and non-acceptance of a bill of exchange, without waiting for demand of payment at the maturity of the bill.

The holder is not bound to present a bill payable on a certain day after date, for acceptance, unless he be an agent to get it accepted, or to collect it. If it be presented, and acceptance is refused, it is dishonored, and immediate notice must be given to the parties who are to be charged.

The act of 1837, ch. 253, was designed to extend the credit which, by the courtesy of commercial nations, had been given to the certificate of a notary public.

The certificate of a public notary had been received as *prima facie* evidence of the presentment by him for acceptance or payment, and of his protest of the bill for non-acceptance or non-payment.

The act of 1837, ch. 253, extends this doctrine as well to inland as to foreign bills or notes, as to notice sent or delivered in the manner stated in the protest.

It is not necessary that notice of protest be sent by mail, and a party is not bound to be more expeditious or certain than the mail.

Notice, if sent by mail, need not be enclosed to the address of the party to be charged. If it be received by him in due time, he cannot object to the mode of conveyance.

Where the protest does not show notice of dishonor transmitted to the party to be charged, that fact may be supplied by other proof.

The rule which excludes hearsay evidence is as obligatory in repelling and discrediting testimony, as in conformatory.

The declarations of a person who is a competent witness cannot be offered in evidence merely because they are in reply to the testimony of other witnesses.

A party may group into one instruction as many and as complicated facts as he pleases, to assume his testimony will prove, and ask the court to instruct the jury on the legal result of that mass of facts, but if amongst the enumerated facts there be such as it is not competent for the jury to act on, he must fail in his application.

Where the instruction given, authorised the jury to find one of three alternate and distinct propositions of fact, without saying which, it is error. It



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would be impossible for them to ascertain whether they were thereby authorised to find the first, second or third alternation.

If counsel present to the court a complicated and involved statement, which it will be difficult for the jury to understand distinctly, it will be a sufficient ground upon which the court should refuse to give a direction in the terms asked for.

APPEAL from *Baltimore County Court.*

This was an action of *assumpsit*, brought on the 9th October 1840, by the appellees against the appellant, who pleaded *non-assumpsit*. At the trial the following exceptions were taken:

1ST EXCEPTION. The plaintiffs to support the issue on their part offered in evidence to the jury the following bill of exchange and protest:

“\$1500. W. B.

*Baltimore, 1st January, 1840.*

Ninety days after date, please pay to the order of *David Whiteford*, fifteen hundred dollars, which charge as advised to account of                      Your obedient servant,

NICHOLAS U. CHAFEE.

To *Messrs. Blum & Cobia*, Merchants, *Charleston, S. C.*”

(Endorsed,) *D. Whiteford*. Pay to order *Messrs. C. Burckmyer & Co. Th. Phenix*. The last endorsement had been erased before the trial.

UNITED STATES OF AMERICA, *City of Charleston, State of South Carolina*. On the sixth day of January, one thousand eight hundred and forty, &c., at the request of *Messrs. C. Burckmyer & Co., I, A. C. Smith*, notary public, exhibited the original draft or bill, a copy thereof on the other side, to *Messrs. Blum & Cobia*, and demanded their acceptance thereof; to which they replied, we decline accepting for want of advice. I forwarded notices to the drawer and endorsers under cover, to *Th. Phenix, Esq.*, cashier of *Western Bank, Baltimore*. Therefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the drawer of the said draft or bill, the endorsers and all others concerned, for, &c. Thus protested at the city of *Charleston, &c.* In testimony whereof, I, &c.

A. C. SMITH, *Not. Pub.*

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And then proved the hand-writing of the drawer and endorser, and their partnership as stated in the declaration; and proved by *Mr. Hall*, that he was a clerk in the *Western Bank* in 1840, and that "N. A., January 11th, 1840," on the books of said bank, is in his hand-writing, and means notice of non-acceptance received on that day, but said witness did not remember either to have received from any one, or delivered to any one, any notice of protest for non-acceptance of the bill upon which this suit was brought. And then offered to prove by *Mr. Taylor*, that he was the runner of the *Western Bank* in 1839 and 1840, who, on his examination in chief, stated, that to the best of his knowledge, he had a notice of protest for *Whiteford* and *Chafee*, which he took to *Whiteford*, the defendant, at his store, who told him to take it to *Chafee*, and that he took it to *Chafee's* dwelling and gave it to some of the females of the family, *Chafee* being then absent at his place of business, his distillery; that witness delivered all notices for *Chafee* at *Whiteford's* store, either to *Whiteford* himself, or a clerk in his store; that all but this one were left there. This witness thought, was left in January, 1840; what time in that month he could not say. Witness told *Whiteford* they were notices of protest for drawer and endorser.

On cross examination, witness stated, that he had not read these notices, nor did he know what their contents were; that he made no memorandum of the time when he left them, nor of the fact of doing so.

The plaintiffs then called *Thomas Phenix*, cashier of the *Western Bank*, as a witness, who stated, after the bill was returned in October 1840, he took the bill and protest to *Whiteford* and asked him for payment; that *Whiteford* expressed great surprise, and said he had no notice of protest for non-payment. Witness replied, the bank had none either, but you had notice of non-acceptance; to which *Whiteford* replied, yes, I might have had that, and objected to payment for want of notice of protest for non-payment. Whereupon, the counsel of defendant asked said witness if he had never stated, that he, witness, had given this notice to said *Whiteford*, who

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replied he never had said so. Whereupon, the counsel for defendant proposed to ask said witness, in order to discredit him by other witnesses, and to show his statements at other times to have been at variance with his evidence now given; whether said witness, after suit brought, had not called upon *Whiteford* to induce him to settle this bill, and whether said *Whiteford* did not at that time state to said witness, that he was not liable for said bill, because he had never received any notice whatever of protest, either for non-acceptance or non-payment, and that said witness replied, *Mr. Whiteford*, you are mistaken, I gave you the notice myself; to which *Whiteford* rejoined, you never did, nor did any one else. To the admissibility of which question the counsel objected, and the court (PURVIANCE, A. J.) refused the said question to be put to the witness in the manner above stated. The defendant excepted.

2ND EXCEPTION. The plaintiffs and defendant having given in evidence the facts and circumstances stated in the first exception, which it is agreed shall form part of this, the defendant proved that the bill in question was discounted by the *Western Bank*, and by them transmitted to the plaintiffs, their agents at *Charleston*, for collection; and also proved that said bill was returned to the bank with the following letter:

*Charleston, September 26th, 1840.*

To *T. Phenix, Cashier*,—We herewith return you this protested draft of *N. U. Chafee*, on *Blum & Cobia*, for \$1,500.

(Signed,) BURCKMYER & Co.

And also, gave in evidence the following letter, written by order of the bank to the defendant:

*Western Bank, September 30th, 1840.*

Sir,—*Blum & Cobia's* note, \$1,500, upon which you are endorser, has this day been returned unpaid, to which you will please attend. Respectfully, W. B. BERRY.

By order, *Th. Phenix, Cashier*.

(Endorsed,) *Mr. D. Whiteford*. Present.

Whereupon, the plaintiff in order to shew an interest in the bill in question in the plaintiffs, or that they were in possession



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thereof at the time suit was brought, offered in evidence the following letter, written to the bank:

*Charleston, October 7th, 1840.*

*Mr. T. Phenix, Baltimore. Dear Sir,*—Your favor of 30th ultimo and 2nd inst. are at hand, returning *Chafee's* draft on *Blum & Cobia*, \$1,500. This draft was regularly noted for non acceptance, and the drawer and endorser furnished with notice of the same. Our young man laid it away in our chest, where it was overlooked; but as *Messrs. Blum & Cobia* had not, nor have had since, any funds of the drawer, we do not think much of the honor of the indorser who would take advantage of an oversight, when no loss has accrued to him thereby. We presume, according to strict mercantile usage, we are responsible to you, but only when you have proceeded against the draft, and obtained from the parties all you can; the balance, if any, we will have to make up. We therefore return you the draft, with protest for non-acceptance. For the purpose, however, of settling this unfortunate business, if you can make a compromise with them at once, and yield up a part, we will make up the deficiency at once. We remain yours, respectfully,

C. BURCKMYER & Co.

Neither *Messrs. Blum & Cobia*, or *Messrs. Caldwell & Sons*, have any property of *Mr. Chafee's*.

To the admissibility of which, defendants objected, but the court overruled the objection, and allowed the evidence to go to the jury. The defendants excepted.

3RD EXCEPTION. The plaintiffs and defendant, to support the issue on their parts, having offered in evidence to the jury the facts stated in the previous bills of exceptions, which it is agreed shall form part of this, the defendant called a witness who proved, that *Thomas Phenix* stated to *Mr. Whiteford*, the defendant, in a conversation in February 1841, that he, said *Phenix*, had served the notice on said *Whiteford* himself: and also proved that said *Phenix* was not in *Baltimore* from the 9th to the 15th January, 1840, and that a letter mailed in *Charleston* on the 6th January, 1840, would have reached *Baltimore* on the morning of the 11th of that month. The plain-

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tiff, in order to corroborate the evidence of *T. Phenix*, then called *Mr. McMahon* and *Mr. Collins* to prove prior statements by *Phenix* to them, and after suit brought, and before February 1841, of his conversations with *Whiteford*, of which he has testified, to confirm his testimony in relation to them. To which the defendant objected, but the court allowed the evidence to go to the jury. The defendant excepted. (This exception was abandoned at the trial.)

4TH EXCEPTION. The plaintiffs and defendant, having given in evidence the facts stated in the preceding exceptions, which it is agreed shall form part of this, the defendant further proved by two witnesses, that they were clerks of *N. U. Chafee*, not living in his house, in January 1840, and that they never saw, knew or heard of any protest, or notice of protest, of the draft now in suit, for either non acceptance or non-payment, until September or October 1840. The plaintiffs then offered to prove, that shortly after the time when these notices must have been received, *Chafee* called at the *Western Bank* and stated to witness, that notwithstanding the protest for non-acceptance, the bill would be paid at maturity. To the admissibility of which statements by said *Chafee*, in order to affect in any way the draft in this cause, the counsel for the defendant objected, but the court overruled the objection, and allowed the evidence to go to the jury. The defendant excepted.

The plaintiffs and defendant having given in evidence the facts and circumstances as stated in the foregoing exceptions, which it is agreed shall form part of this, the defendant then proved what is stated in the foregoing agreement:

It is admitted, that a letter leaving *Charleston* by the mail of the 7th January 1840, would have reached *Baltimore* on the morning of the 11th, before 9 o'clock, and that defendant is, and always has been, a resident of *Baltimore*, and that the 11th January 1840, was Saturday. And also, that *Thomas Phenix* was absent from *Baltimore* during the 10th, 11th, 12th, 13th and 14th January 1840, and proved by said *Phenix*, that he never saw the notices of protest for non-acceptance, and

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proved by *Berry, Hull and Mason*, clerks in said bank, that they never saw said notices, and know nothing of their delivery. The defendant further proved, that this bill was discounted by the *Western Bank*, and was by them sent to plaintiffs, their agent at *Charleston*, for collection, and was returned to said bank in the following letter. (See letter of 26th September 1840 ante 132.) The plaintiff then gave in evidence the following letter from plaintiffs to the *Western Bank*. (See letter of 7th October 1840, ante 133.) The defendant then proved, that when this draft was discounted, *Charleston* was paying specie, and *Baltimore* funds, including notes of the *Western Bank*, were seven per cent. below specie; that it would cost about one per cent. to transmit specie from *Charleston* to *Baltimore*; that drafts in January 1840, were sold by the plaintiffs in *Charleston*, on the *Western Bank of Baltimore*, at three per cent. discount; that is, \$970 in *Charleston* purchased a sight check on *Baltimore* for \$1,000. And also proved by *Herman Perry*, that on the 15th January 1840, he bought a draft on *Charleston* in *Baltimore*, at sixty days, at par. The defendant then proved, that there was a great difference between the price of sight and time drafts; and there was no regular rate of exchange from *Baltimore* to *Charleston*; and that one per cent. was a fair rate of exchange on a bill drawn from *Baltimore* on *Charleston*; and further proved by *T. Phenix* that when he discounted said bill, he charged one per cent. over and above the legal rate of interest, as exchange and not as interest or usury. The defendant also proved he had merely endorsed this bill for *Chafee's* accommodation. It is also admitted, that the testimony as to *Chafee's* declarations to *Phenix* was taken, subject to exception as to its admissibility to affect this defendant; but that it was offered in evidence after the evidence offered by the defendant, by *Chafee's* clerks, to prove that they never saw or heard of any such notice, and to show that *Chafee* had never received it.

The defendant then made the following prayers to the court, and the plaintiffs submitted the following modification thereof:



1. That the defendant in this case being an endorser of a bill of exchange, drawn upon a party in another State, and there protested for non-acceptance, was entitled to strict notice of the presentment of such bill and the protest thereof.

2. That such notice is not sufficient if given by a stranger to the bill, but could only be given by one of the parties to such bill, or by a duly authorised agent of one of the parties to such bill.

3. That a notice given by *Mr. Taylor*, unless authorised by some of the parties to said bill to give the same, was not sufficient notice.

4. That the evidence given by *Taylor* is not sufficient to shew that strict notice was given to *Whiteford*, of the protest for non-acceptance of the bill of exchange in controversy in this suit, and that evidence of a waiver of notice is not sufficient to maintain the present declaration, if the jury believe that *Whiteford* received no consideration from *Burckmyer & Co.*, the plaintiffs, or from any other person for said bill.

5. The defendant prayed the court to instruct the jury, that if they believe that a letter leaving *Charleston* by the mail of the 7th January 1840, would have reached *Baltimore* on the morning of the 11th January 1840, before 9 o'clock; and if they further believe that defendant was always a resident of *Baltimore*, then plaintiffs are bound to prove that notice of demand on and refusal of acceptance by the drawee, was given to defendant on said 11th January 1840, or upon the first business day thereafter.

6. That in order to enable the plaintiffs to recover, they must satisfy the jury that a demand of the bill was made of the drawees, and acceptance refused by them, or one of them, and notice thereof sent to the defendant by the first or second mail which left *Charleston* for *Baltimore*, after the demand and refusal of acceptance, or if no notice was sent to defendant from *Charleston* by any of the parties to the bill, nor by the agent of any of them, but the only notice sent from *Charleston* was transmitted to *T. Phenix*, the cashier of the *Western Bank*, then that said *Phenix* or some agent of said bank, or some

other party to the bill, or some agent of such other party, at some time not exceeding a day after the receipt of such notice by said *Phenix*, gave notice of such demand and refusal to defendant, and the burthen of proof is upon the plaintiffs to shew such notice given, and unless the jury are satisfied from the evidence, that notice was given to defendant within one day after the arrival of such notices at the *Western Bank*, plaintiffs cannot recover in this case.

7. If the jury believe that the *Western Bank of Baltimore* were the holders and owners of the bill on which this suit is brought, at the time it was so brought, the plaintiffs cannot recover in this case, although this suit was brought in their names, by order of the bank.

8. That in order to entitle the plaintiffs to recover, they must show either a demand for payment of the bill from the drawee, and refusal by him to accept, or notice of demand and refusal to defendant, or waiver of such demand and notice.

9. If the jury believe that the true rate of exchange between *Baltimore* and *Charleston* was in favor of *Charleston* at the time this bill of exchange was discounted, that the agreement to take, and taking one per cent. for exchange, over and above the legal rate of interest, is usurious, and the said bill is void, and plaintiffs cannot recover in this case. (Abandoned at the trial.)

10. That all the testimony offered by the plaintiff, with reference to the acts and declarations of *Chafee*, are inadmissible to charge the defendant in this cause.

11. That there is no evidence in the cause to shew a proper legal notice of protest for non-acceptance, to the defendant in due time.

12. That in order to entitle plaintiffs to recover, there must be evidence of a demand of payment of the bill, when the bill in controversy became due, and notice of the refusal to pay the same.

13. If the *Western Bank*, at the time they took the bill of exchange now in controversy, did ask and take a higher rate of exchange than was currently paid for good bills of exchange

on *Charleston*, it is usury, and the plaintiffs are not entitled to recover. Abandoned at the trial by counsel.

14. That the protest offered in evidence, is no proof of notice of presentment, for non-acceptance and refusal to accept having been duly and legally sent from *Charleston* to *Baltimore*.

*Qualification by Plaintiff of the Defendant's sixth Prayer.*

"But the fact that such notice was given to the defendant, may be established by circumstantial or presumptive evidence, as well as by direct proof; and the protest for non-acceptance offered in evidence, the proof by the witness *Taylor*, of the actual delivery of certain notices of protest to the defendant, as stated by said witness, and the conversations of the defendant with the witness *Phenix*, as proved by said *Phenix*, furnish evidence from which the jury may infer, that such notice as is above mentioned, was given to the defendant."

The plaintiff then prayed the court to instruct the jury, that the proof offered by the plaintiff, of the delivery by the witness *Taylor*, at the residence of *Chafee*, the drawer of the notices of protest originally taken to the defendant, and of the acts and statements of the said *Chafee*, in relation to the same, as proved by the witness *Phenix*, being offered in reply to the proof offered by the defendant, by the witnesses *Benson* and *Brummell*, to shew that such notices never were delivered to, or received by said *Chafee*, is admissible to prove that said *Chafee* did receive said notices, and that they were notices of protest for non-acceptance, relating to the bill sued on; and that such proof is evidence in connection with the protest for non-acceptance offered in evidence, the proof by the witness *Taylor*, of the actual delivery of said notices in the first instance to the defendant, as stated by said witness, and the conversations of the defendant with the witness *Phenix*, as proved by said *Phenix*, from which the jury may infer, that such notice as is mentioned in the plaintiff's fifth prayer, was given to the defendant; or is at least evidence from which the jury may infer, that said notices, which according to the proof



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of the said *Taylor*, the witness, was originally taken by him to the defendant, and afterwards by the defendant's directions, were taken by said witness, and left at the residence of said *Chafee*, were notices of protest for non-acceptance of the bill sued on in this case, or that it is at least, evidence to confirm the testimony of the witness *Taylor*.

Whereupon the court (PURVIANCE, A. J.) granted the first, second, third, fifth and eighth, prayers of the defendant, and the sixth with plaintiff's qualification, and also granted the plaintiff's prayer, and *refused the other prayers of the defendant*. The defendant excepted.

The verdict and judgment being against the defendant, he appealed to this court.

The cause was argued before STEPHEN, DORSEY, CHAMBERS and SPENCE, J.

By WALSH and RICHARDSON for the appellant, and  
By McMAHON for the appellee.

CHAMBERS, J., delivered the opinion of this court.

Of the numerous questions arising on this record for our decision, the first is whether the testimony which the defendant proposed to offer, and to which the plaintiff objected, as stated in the first bill of exceptions, was admissible. It is certainly a sound rule, that before you can discredit a witness by proof of his having made statements at variance with his testimony, you must first afford to the witness whom it is intended to impeach, a full and fair opportunity to recollect, by calling his attention to dates, names or other attendant circumstances connected with the matter about which he is to be charged, to have made different statements. But in the matter of the testimony which it is proposed to contradict, or in the manner of arriving at it, the party will not be allowed to violate any positive law of evidence. It is not permitted to ask a witness any fact which fancy or idle curiosity may suggest, for the purpose of disproving it by another witness; nor is it proper to ask a witness with the same view, of a fact proper in

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itself to be proved in the cause, if the only knowledge of such fact has been obtained through a source which the rules of evidence do not recognise as competent.

It is an unbending rule of evidence, subject to very few and well defined exceptions, that a party cannot offer in evidence his own declarations in relation to the subject in controversy; and to ask a witness to repeat what a party interrogating him has said, although such interrogatory be accompanied with a declaration of his purpose to contradict the answer, might often lead to the introduction of evidence as effectually destructive of this rule as if no such purpose were avowed as a motive for it. In the testimony proposed to be given and which the court below allowed to be asked, were certain declarations of the defendant himself in relation to the fact then in controversy. We think the court properly refused to permit the defendant to give evidence of his own declarations that he was not liable, and had not received notice of protest, nor do we think, as one of the counsel has suggested, that where a question is proposed to be asked of a witness, which involves several distinct members, the court is bound to select from the question such members of it as might be admissible if unaccompanied by others with which it is connected, and say that such particular portions of the testimony are proper.

The second exception raises the question whether the plaintiff's letter of 7th October 1840, was admissible evidence. By an agreement of counsel, it is admitted the letter was written and addressed by the appellees, but there is no proof of the *time* when it was written; none that it was received by the person to whom it was addressed, or that it did in fact enclose the bill of exchange. Waiving however these objections we cannot distinguish between the statements reduced to writing in this letter, and the same statements by the same persons at the same time and under similar circumstances, made verbally. If the person to whom the letter was addressed had been called to prove that the appellees, plaintiffs below, had made to him the same declarations verbally, it would have

been in direct violation of that admitted rule of evidence which prohibits a party from testifying in his own case; and in this case the facts shew that it was made evidence in despite of another principle, which requires the best evidence the nature of the fact affords. *T. Phenix*, the person to whom the letter was addressed, by whom the note was received if sent with the letter, was a witness in the cause, and was competent to prove all that the letter itself is said to have been designed to prove. We think the letter was not therefore admissible.

The third exception has been abandoned, and we therefore have only to affirm the opinion expressed in it.

We differ with the court below in the opinion expressed in the fourth bill of exceptions. *Chafee* was a competent witness in the cause, and his testimony upon oath was better evidence for any purpose, or in any view, than the testimony of his declarations derived through a third person. The appellees' counsel endeavored to evade the force of this objection, by insisting that *Chafee* must be regarded as the agent of the appellant, the defendant below, who for that reason could be charged upon his agent's admissions. If an agency be established, it is generally true that an admission of the agent while in the execution of his agency, is admissible to charge his principal. But the only authority which by possibility can be claimed for the witness *Chafee*, was an authority to receive the notice of protest sent to appellee.

Admitting for the argument, that there was such an authority, his declarations made at the bank at a subsequent time, and in reference, not to the notice to *appellant*, but to *himself*, could not be regarded as being in the execution of such authority.

In the fifth exception, the court below was called upon by the appellant, the defendant below, to instruct the jury on fourteen different points. The court gave instructions on five of these points as asked for. To one of them the appellee, plaintiff below, proposed a modification, and it was given with the modification annexed. One instruction was asked for by the appellee, which was given.



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The appellant's counsel has rightly abandoned the two points raised on the question of usury, and the remaining questions present themselves for decision.

The first in order contains two distinct propositions of law, one that *Taylor's* testimony was not sufficient to prove notice of protest; the other that proof of waiver of notice would not support the action if the appellant received no consideration.

To entitle an appellant to a reversal for error in instructions, he must make good all the propositions contained in his motion, however numerous they may be. Hence the prudence of presenting a single and explicit point to the consideration of the court.

If the first of the two propositions before us had been presented singly, we should say it was sustained. The amount and importance to the community of negotiable paper, has occasioned a system of law as applicable to it, peculiar in many respects. Its apparent strictness has been found by long experience a necessary preventive to serious mischief. The necessity which introduced it, continues to demand an exact conformity to its terms. In no department of this system is there required more unyielding compliance with its rigorous demands, than in regard to notice of protest. Certain technical rules as to the time and manner of serving it have been adopted, and no question about consequent loss or otherwise, or about abstract notions of justice or equity, can be started with the view to exempt a party from their observance. It is admitted that it was necessary in the present case, that notice of protest should have been served on the appellant not later than on Monday, the 13th January 1840, on the hypothesis most favorable in this respect to the appellees; that is, assuming that notice of protest was addressed under cover to *T. Phenix*. The necessity for plain and satisfactory proof as to the time of service has always been insisted on. Certainly it may be proved by circumstantial testimony, but the circumstances must point not to notice at *some* time, but to notice on the day when the party had a right to expect and receive it. In 1 *Stark. Rep.* 314, the proof was on *one of two days*, but the court held it

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not sufficiently certain. Here *Taylor* says it was "some time in January."

It has been urged that the testimony of one witness cannot be selected from a mass of testimony with which it is connected, and be made the subject of such an instruction. It well may, and doubtless often does happen, that a fact is satisfactorily proved to the jury by the testimony of several different witnesses, each testifying to distinct parts of a transaction, when the evidence given by either one, would not prove the fact. Still we do not perceive the propriety, or principle or authority, of restraining a party from attacking the evidence of either of the several witnesses as to its sufficiency. He may be able to impeach, contradict or explain the testimony of the others, and thus make it quite important to have the legal effect of the one witness declared by the court. If he fails to contradict it in any part, or if the opposite party apprehends mis-conception on the part of the jury from such an instruction, the effectual remedy is at hand by asking an instruction on the whole testimony taken together.

But although this first proposition is tenable, the court correctly refused to give the fourth instruction asked for, because the second proposition involved in it could not be sustained. We hold it clear, as well upon principle, as from adjudged cases, that a party may waive the privilege of claiming notice of protest, as he may any other right which the law has secured to him. The authorities cited in the argument shew that this is regarded as settled law elsewhere, and in the late case of *the Farmers Bank vs. Duvall*, 9 G. & J. 31, this court assumed such to be the law in *Maryland*, although the objection was urged then, as it is now, that the declaration expressly alleged notice.

The next question we are to consider in this exception is, whether there be any thing of which the appellant can complain in reference to the giving of the sixth of the instructions asked for by him. We hold it to be the privilege of a party to raise any question of law arising out of the facts of the case, and to demand the opinion of the court distinctly upon

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it. If the opposite party believes that other facts not embraced in the hypothesis assumed, are properly calculated to justify an application for other and different instructions, he has the equal privilege of asking an opinion on the additional facts, but not the privilege of controlling and modifying the hypothesis of his antagonist. To allow this, would often defeat a most important right. The illustration may be found in the case before us. Assuming, as the appellant's sixth instruction does, that the appellee would rely on proof of presentment and notice of non-acceptance, and not on a waiver of notice, it is not denied that it contained the law of the case, correctly asserting that notice must be proved as therein stated, and that the burthen of proof was upon the plaintiff in the cause. The assertion of this proposition was of no sort of importance to the appellant, unless he could satisfy the jury, that the plaintiff below had failed to exhibit the proof which the court declared it to be necessary for him to produce. He thereby virtually denied the existence of such proof. It would therefore be manifestly suicidal for him to subjoin to the instruction asked for, the further opinion of the court that the jury might, in the facts enumerated in the modification, find the proof required. In effect it makes the appellant to ask the court to say to the jury, "the plaintiff cannot recover without a certain description of proof, but the facts in evidence may be regarded as such proof." No party can be coerced into such an attitude. If the proposition asked for is not justified by the evidence, or is not in accordance with the court's opinion of the law, they may refuse it altogether, or they may state in what respects they dissent from it, but the opposite party has not the right to annex modifications to it against the consent of the party moving it. Although the exception does not explicitly state this as one of the grounds on which it was taken, yet the generality of its terms will include this as well as every other ground of complaint. We think the court were wrong therefore in declining to give the sixth instruction without the modification. We think too, that the language in which that modification was expressed, was calculated to lead the jury to a conclusion which



the court certainly could not have designed to influence. "The proof by the witness *Taylor* of the *actual delivery* of certain notices of protest to the defendant," these expressions might readily be regarded by the jury as evincive of a decided opinion that *Taylor* had proved an actual delivery of notice to defendant, and yet it is very manifest that this was one of the contested facts in the cause, upon which of course the jury should act without the slightest bias from the court.

In the seventh instruction, the court informed the jury that if the suit was brought in the name of the plaintiffs below by order of the *Western Bank*, it was not sufficient to defeat the action to shew that the bank was the owner and holder of the note at the time the suit was instituted.

Assuming the language used to import the *entire* and *exclusive* interest in the bill and its possession, we do not concur in that opinion. The authorities produced by the appellee's counsel, and the principles deduced from them are not denied. Possession of a note endorsed in blank, will enable the party having it to maintain suit, except *mala fides* be proved. Courts will never enquire whether a plaintiff sues for himself or as trustee for another; nor into the right of possession, unless on an allegation of *mala fides*; and blank endorsements may be filled up at the moment of the trial. None of these propositions can govern this case. It is a principle of universal application, that actions at law are to redress wrongs or enforce rights. The quantum of the injury or the value of the rights may not be weighed, but to complain of an injury inflicted, or a right violated, when that injury was exclusively inflicted on another, or the right exclusively the property of another, without any interest in the plaintiff, would certainly be an anomaly in the law. None such is found in the particular department we are considering. If a bill has been transferred by endorsements, all of them in full, it can only be sued on by the special endorsee. *Story on Bills*, 230, 231, *sec.* 207, 208. Why is it so? Certainly for the reason that as no interest in such a bill can pass by delivery alone, the entire interest in legal contemplation remains in the last endorsee, and all others are strangers in interest.

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A bill payable to bearer, or a bill payable to order and endorsed in blank, will pass by delivery, and bare possession is *prima facie* evidence of title; and for that reason possession of such a bill will entitle the holder to sue. The law is not changed by any consideration of the character of parties as *principal* or *agent*. If an agent receive a bill with all the endorsements in full, and the last in full to his principal, the agent cannot sue in his own name; or if the endorsements are in blank, and he were to fill it up to himself or his principal, it could not be sued on in the name of a stranger. Some interest must appear. It may be said that where all the endorsements are in full, the last endorsee may sue for the use of the actual holder. True he may, and this confirms the principle we assert, the endorsee being the *legal* plaintiff.

In the case before us the appellant, the defendant below, claimed that by the evidence, it appeared that the plaintiff in the action had received the bill merely as agents for the *Western Bank*, to whom they had returned the bill prior to the suit, and that the bank continued to be the owners and holders of the bill. The case of *Clark vs. Pigot*, 1 Salk. 126, has much analogy to the present in principle. There *Clark* having a bill payable to himself or order, put his name upon it, leaving a vacant space above, and sent it to his friend J. S., who got it excepted. Upon suit brought by *Clark* against the acceptor, it was objected that J. S. should have brought suit and not *Clark*. It was held that J. S. might have made himself endorsee by filling up the blank to himself, and then the property in the bill would have passed to him, and he alone could have maintained the action; or he might act as servant to *Clark*, (of which his failure to fill the blank was regarded as proof,) and thus leave the property of the note and the right of action in *Clark*. It would seem that striking out the name of *T. Phenix*, and returning the bill by the appellees to the *Western Bank*, would be at least as strong evidence of their acting as agents for the bank in the present case. The legal interest in such a bill, payable to order with full endorsements, can pass *only* by endorsement, and the person holding it, though for full value, has

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but an equitable interest, which the court will protect to the same extent as it does the equitable interests of those for whose use actions are instituted upon choses in action not negotiable.

The decisions in this court have been in perfect consistency with these views.

In *Hudson vs. Goodwin*, 5 H. & J. 115, it was held that a plaintiff was not entitled to recover on a promissory note payable to order, because the endorsement was in blank, although he might have filled it up at any time before verdict. The same point was ruled in *Day vs. Lyon*, 6 H. & J. 140.

In *Kiersted vs. Rogers*, 6 H. & J. 282, it was held that a blank endorsement might be filled up by the holder at the time of the trial; that if filled up and made payable to himself, the holder *must* sue as endorsee, but if not filled up he may sue in the “name of the endorsee,” meaning of course, *for the use* of the holder. In that case the endorsements were in full, and the last of them to the plaintiff, who had endorsed their names in blank, but had retained the bill, or at all events held it at the institution of the suit; and the court say the plaintiff had not parted with any interest in the bill by the act of endorsing it in blank.

The act of 1825, ch. 35, passed since these cases were decided, provides that no judgment shall be set aside because of the endorsement being in blank, and in effect gives to a plaintiff all the advantage from a blank endorsement which he could derive from an endorsement in full, so far as his right of action is effected. Any holder therefore with a blank endorsement, may now sue in his own name, but the act of 1825 cannot be construed to extend the right of action to one who has no interest in the bill, either as holder or owner.

In *Bowie use of Ladd, vs. Duvall*, 1 G. & J. 175, the note was given by *Duvall* to *Bowie*, and by him endorsed in full to *Ladd*. The suit was in the name of *Bowie* for the use of *Ladd*. The court after referring to the statute of 3 & 4 *Anne* ch. 9, which put promissory notes and bills of exchange on the same footing, say, “when a bill of exchange is endorsed in full, all the legal interest is transferred to the endorsee, and he *alone*



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is qualified to maintain a suit." And it was held accordingly, that *Ladd* should have been the legal plaintiff, and could not support the suit in the name of *Bowie* for his use. Yet if *Ladd* had endorsed his name in blank, and transferred the note to a third person, there can be no doubt, without reference to our act of 1825, that such third person, being the holder of the note, might have sued in his own name and have filled up the blank endorsement at the trial, making it payable to himself, or without filling the endorsement might have sued in the name of *Ladd* for his use. But that in such a case as the one last mentioned, to wit, a blank endorsement and delivery of the note by *Ladd* to a third person, a stranger not having any legal interest in the note, either by the terms of the endorsement or by the possession of the note, could have maintained the suit in the name of such stranger, we cannot agree. And such is the hypothesis of the instruction asked for in the case at bar, and which for the reasons assigned, we are of opinion the court should have granted.

The tenth instruction was upon the admissibility of the acts and declarations of *Chafee*, in regard to which we have given our views in discussing the fourth exception. We will only add, that there appears to be no *act* of *Chafee*, in evidence, except his going to the bank, and we have treated the exception therefore as if it were an objection to his declarations. If any act of his affecting in any manner the issue in the cause had been the subject of the exception, we should consider it as properly admissible by any competent witness, as any other fact.

The court properly refused the eleventh instruction asked for. It is a settled principle that the court will not instruct the jury in such unequivocal terms, if there be any evidence whatever tending to prove the issue.

The declarations of the appellant to *T. Phenix* had been given in evidence; they were to be weighed by the jury. The counsel seemed to admit, and the authorities certainly shew, that admission of notice is evidence on which the jury may find notice in due time and in due form. Vide 7 *East*. 237. 28

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*Eng. Com. Law*, 401. 33 *ditto*, 337. 41 *ditto*, 427 and 790. 1 *Leigh*, 448. And 23 *Wendel Rep.* 379, *Tebbets and Pearce vs. Dowd*.

We think the court below properly refused the twelfth instruction. It can no longer be considered an open question, whether an action will lie upon notice of presentment and non acceptance of a bill of exchange, without waiting for demand of payment at the maturity of the bill. The holder is not bound to present a bill, payable on a certain day after date, for acceptance; unless indeed he be an agent to get it accepted or to collect it. 5 *Dow & Ryl*, 374, *Van Wait & Woolley*. 3 *Barn & Cres.* 439. *Chit. on Bills*, 300. If it be presented and acceptance is refused, it is dishonored and immediate notice must be given to the parties who are to be charged. 1 *Peters, S. C. Rep.* 25, *Bank of Washington vs. Triplet & Neale*. 2 *Ib*: 170, *Townley vs. Sumrall*. That the drawer or endorser may forthwith be sued upon the protest without waiting for demand of payment, is abundantly settled by the long list of authorities cited in argument, to which others might be added if there were any conflicting decisions, which we do not find to be the case. Vide *Story on Bills*, 367, *sec.* 21, and the authorities there cited.

In the case in the late General Court, reported in 1 *H. & J.* 187, *Phillips vs. McCurdy*, the neglect to give notice of the non-acceptance was a sufficient ground on which to sustain the opinion of the court.

The fourteenth instruction presents the question whether the protest is of itself any proof that notice had been “duly and legally sent from *Charleston to Baltimore*.”

The act of 1837, ch. 253, was obviously designed to extend the credit, which by the courtesy of commercial nations had previously been given to the certificate of a notary public. That certificate had been received as *prima facie* evidence of the presentment by him for acceptance or payment, and of his protest of the bill for non-acceptance or non-payment. This was of course on the ground, that in every commercial community this officer would be worthy of faith and credit, or at least would be so considered until the contrary was made appear by disproving his assertion. The act of Assembly has wisely car-

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ried out the same presumption by saying first, that this doctrine should so applied thereafter as well to inland as to foreign bills or notes, and secondly, that such protest should be *prima facie* evidence that notice has been sent or delivered in the manner therein stated. This act of Assembly is to be so construed, as to effect the obvious purpose of its enactment. It is not necessary that notice be sent by mail. The legal presumption is, that where there is a regular daily mail, it affords an early conveyance and a safe one, and a party is not bound to use one more expeditious or certain, but he *may* do so, and surely it would be no cause of exception to the regularity of the notice, that it was received in advance of the mail. Neither is it necessary, however it may be prudent, that the notice if sent by the mail be enclosed to the address of the person to be charged. If a party be willing to hazard the receipt of notice by his correspondent, and the due attention of the correspondent to the service of the notice, he must abide the result. But if the party to be charged receive the notice in due time, he cannot object to the means which the owner or holder of the bill has employed. The act of Assembly seems so to regard the matter, where it puts the case of a protest which "shall state that notice has been sent or delivered to the party or parties to such note or bill, and *the manner* of such notice." This protest states the "notices were forwarded to the drawer and endorsers under cover to *T. Phenix, &c.*" The notices were sent to the *drawer* and *endorsers*; the *manner* of sending them was by enclosing them under cover to *T. Phenix, Baltimore*. If therefore the name of *Phenix* had never been upon the note, as by the admission now put on the record is found to have been the fact, we should hold there was no force in the objection, that the notice was not sent to the parties, considering the act of 1837 to apply to a case in which a notary shall certify that he has sent notice to a party under cover, addressed to a third person. In this case there was evidence before the jury tending to shew that the appellees were acting as agents for the bank without any actual interest in the bill, and the appellant has based some of his motions for instruction on this theory.



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Consistently with this assumption, it was quite in conformity with their duty as agents, to send, or cause the notary to send, the notices to the principal. *Vide 3 Bos. & Pul. 599, Haynes vs. Birks. and 8 Barn. & Cres. 387, Firth & Thrush.* This would make a clear case within the act.

It is true that in these cases, the entire object designed by the act is not effected, to wit, the service of the notice on the parties to be charged, or the equivalent fact of putting a notice separately addressed to each into the post office, but that result ensues, because the parties have not availed themselves of the advantage the act gave them. Their neglect to do so, will require the further proof to the jury, that the person to whom the notary enclosed the notices, had served them in due time. This instruction does not meddle with that link in the chain of testimony; it is not made a question whether notice was duly sent to the party to be charged, but to *Baltimore*, and that question was in our opinion properly decided by the court.

The only remaining matter for consideration, is that involved in the instruction given at the instance of the appellees, and in regard to most of which, our views have been already expressed.

In this bill of exception, it is carefully stated that *Chafee's* declarations were offered in reply to the testimony of other witnesses, but we cannot agree that this obviates the difficulty which is fatal to their admissibility. If the facts were as *Chafee's* declarations stated them to be, it was competent and necessary to call him to prove them, and the rule which excludes hearsay testimony, is as obligatory in repelling and discrediting testimony, as in confirmatory. The court therefore erred in presenting such testimony to the jury as the foundation, in any degree, upon which to find a verdict. A party may group into one instruction as many and as complicated facts as he pleases to assume his testimony will prove, and ask the court to instruct the jury on the legal result of that mass of facts, but if amongst the enumerated facts there be such, as whether from a total failure of evidence tending to prove them, or from having been ruled out of the cause, or for other rea-

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son, it is not competent for the jury to act upon, he must fail in his application. And if on appeal, this court shall determine any fact in such hypothesis to have been improperly allowed to go to the jury, the decision of the court below granting such prayer must be dissented from. We find in this instruction also, the objectionable manner of putting the testimony of *Taylor* before the jury, which has been alluded to when speaking of the "modification" to the sixth instruction. We should feel ourselves compelled to dissent from the opinion of the court below as expressed in this instruction, for the reason that they were authorised to find one of three alternate and distinct propositions of fact, without saying which. The instruction is, that the jury may infer that "notice was given to the defendant, or at least that the notices taken by *Taylor*, by direction of defendant to *Chafee's* residence, were notices of protest for non-acceptance of the bill sued on," or at least might regard it as "evidence to confirm *Taylor*." The great point in contest, was due notice, *vel non*. If the evidence was legally sufficient to find for the plaintiff on that point, and the jury believed it, they might find accordingly, and the instruction thus covered the whole case.

The second assumes that the testimony might not be legally sufficient to authorise a verdict on the point of notice to defendant, but it would authorise the jury to identify the paper spoken of by *Taylor*, and which being identified, formed one item in the proof of notice, but still left open the important question of *when* that notice was served. The third proposition is, that the evidence may be regarded to confirm the testimony of *Taylor*. But assuming *Taylor* to be sustained, and the jury satisfied that *Taylor* was perfectly accurate in what he had said, yet he had not said that he gave due notice to the defendant, and the jury might believe he had served a notice, and that it was of the dishonor of the bill sued on, and yet consistently with this, they might think it was not proved to be on the 11th January. We do not think that such an alternate series of propositions should have been presented to the jury with an opinion that they might find some one of them. It

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would be impossible for them to ascertain whether they were thereby authorised to find the first or the second. The sole purpose of instructing the jury, is to aid and enlighten them in their duty, so far as it is competent for the court to assist them. If counsel present to the court a complicated and involved statement which it will be difficult for the jury to understand distinctly, it will be a sufficient ground upon which the court should refuse to give a direction in the terms asked for. It is much to be desired, that propositions for the court, or for the jury, should be as precise and distinct as possible. Few instances will be found in which a transaction however ramified in its details, may not be reduced into something like elementary and distinct parts or points, each readily to be comprehended by minds of ordinary intelligence.

It may be proper to remark, that amongst the errors we have noticed, there are some, which of themselves would not have been deemed of sufficient influence in the decision of the cause below, to require this court to reverse the judgment and send the case back; but there are others of such substantial importance as to induce us to reverse the judgment and award a procedendo.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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ROBERT W. BROOKE vs. WILLIAM F. BERRY.—*December,*  
1843.

In an action of *replevin* brought for certain slaves by W against R and E, it was proved, that for several years before the 1st January 1837, the defendant E was in possession of the slaves taken under the writ. The plaintiff for the purpose of showing title in himself, proposed to read to the jury articles of agreement dated on that day, between himself and E, by which the latter agreed to furnish him with certain negroes, (bearing the same names with those replevied,) for the period of ten years. The defendant objected to the admissibility of the articles of agreement, upon the ground that there was no evidence that he claimed title under E, or any connexion between them. **HELD:**



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1. That if the articles of agreement furnished evidence that E's title had passed to W, (the plaintiff having first showed that E had title,) they established his title against the defendant, whether the defendant claimed under E or not, or whether E had any connexion with R or not.
2. That the question to be decided was the admissibility of the evidence offered, and not the correctness or incorrectness of the particular ground on which the court below decided.
3. That there must be some evidence to show the identity of the negroes assigned, with those replevied.
4. That having shown title in E, the articles constituted a link of the plaintiff's title, and would or would not be evidence in the cause, upon the establishment or failure to establish the identity of the negroes.
5. That the defendant having objected to the evidence on a ground that assumed the identity of the negroes, and before the plaintiff had an opportunity of disclosing his whole proof, the court below were justified in assuming, what he, in such a state of the case, conceded.
6. The original possession of E, the negroes being replevied from him, and bearing the same names in the articles and writ, and nothing to show that E had other negroes of same name, is evidence of identity.

The action of replevin is appropriately applied to all cases in which the plaintiff seeks to try the title of personal property and recover its possession. E by articles under seal agreed with W, that for the consideration therein-after mentioned, he would furnish him with negroes, &c., "all which property is to remain with the said W, on the land where he now resides, for and during the term of ten years, and to pay him annually the sum of, &c. W agreed that he would pay E one-half of the crops made during the above time, and would superintend and look after all E's business." On the execution of the agreement, the negroes were delivered to W, and remained with him several years, when they ran away and came to the possession of E and R, the other defendant in the writ. **HELD:** that *replevin* was an appropriate remedy for W; and he was not bound in order to maintain it, either to show a performance, or a readiness to perform the agreement on his part, and that the contract gave him a present and immediate right to the negroes, and to possession for ten years from its execution.

E in 1837, conveyed certain negroes to W, to be retained by him for ten years; some time after the negroes ran away, and came again to the possession of E, who in February 1840, executed a deed of trust of all his estate to R. In an action of replevin brought in May 1840, by W against E and R for the negroes, the defendants proved that in March 1840, R called on W, and informed him of his deed, and that he came to demand the land, negroes, &c., of E, then in W's possession, who said, there are the negroes, go and take them, I have no title to them, but I will not give up the land; that two of the negroes in controversy were then in view of the parties at work with other negroes, proved to have been the property of E. Under such a state of facts, the plaintiff, *for the purpose of rebutting the inference that he surrendered and abandoned all right to the negroes.*

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may show that immediately after the demand made upon him by R, that he, R, and the witness who proved it, went to the residence of E, where W asked him in the presence of all the parties, whether he had authorised R to interfere with the property mentioned in the agreement of 1837, and that E replied he had not, that his intention was to convey his residuary interest in the property in W's possession.

APPEAL from *Prince George's* County Court.

This was an action of *Replevin*, brought on the 15th May 1840, by *William F. Berry* against *Elisha Berry* (who died before the trial,) and *Robert W. Brooke*, for the negro slaves mentioned in the proof. The slaves were replevied and delivered to the plaintiff.

The defendant pleaded—

1. Property in the defendant.
2. Property in a stranger.
3. *Non cepit*.
4. *Actio non accrevit infra tres annos*.

On these pleas issues were joined, and the jury found the following verdict, viz: that the plaintiff is entitled to the possession of the negroes replevied in this case, to wit, *John*, *Bill* and *Hanson*, for the unexpired term of ten years, which commenced on the 1st January 1837, and one cent damages.

1ST EXCEPTION. At the trial of this cause, the plaintiff to maintain the issues joined on his part, proved to the jury that for eight or ten years prior to the 1st January 1837, *Elisha Berry*, one of the defendants, against whom the writ in this cause issued, was in the possession of the negroes taken under the writ; that he the said *Elisha Berry*, died in the month of April 1841, and was alive and in being at the period of the execution of the writ. The plaintiff then, for the purpose of showing title in himself, proposed to read to the jury the following articles of agreement, between the said *Elisha Berry* and the plaintiff, dated the 1st January 1837, which are as follows:

“Articles of agreement made, concluded and agreed upon, this 1st day of January 1837, between *Elisha Berry*, of *Prince George's* county, of the one part, and *William F. Berry*, of

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the same place, of the other part, as follows, to wit: The said *Elisha Berry*, for the consideration hereinafter mentioned, doth for himself, his executors and administrators, covenant, promise and agree, to and with the said *William F. Berry*, his executors, administrators and assigns, that he the said *Elisha Berry*, shall and will furnish him the said *William F. Berry*, with the following property, to wit, one negro man named *John*, one negro man named *Andrew*, one negro man named *Robert*, one boy named *John*, one boy named *Hanson*, one boy named *Robert*, one woman named *Beck*, and one boy named *Bill*; two plough horses, two oxen, ploughs, cart, and other plantation utensils; all which property is to remain with the said *William F. Berry*, on the land where he now resides, for and during the term of ten years from the date hereof. And he the said *Elisha Berry*, doth further covenant and agree to pay to the said *William F. Berry*, one hundred and fifty dollars, annually; and the said *William F. Berry*, on his part, doth hereby covenant and agree, that he will pay to the said *Elisha Berry*, the one-half of the crops made by him the said *William F. Berry*, for and during the term above named, after deducting the expenses for making the said crops. And he the said *William F. Berry*, doth covenant and agree to superintend and look after all the said *Elisha Berry's* business. For the true and faithful performance of the foregoing covenants and agreements, the said parties do hereby respectively bind themselves and their respective heirs, executors and administrators, each to the other, his executors and administrators, in the sum of one thousand dollars. In witness whereof, they have hereunto set their hands and affixed their seals, the day and year above written.

ELISHA BERRY, (Seal.)

W. F. BERRY, (Seal.)"

Signed, sealed and delivered in the presence of

*Enos D. Fergusson.*

But the defendant objected to the admissibility of said articles of agreement, upon the ground that there was no evidence to shew that he claimed title under the said *Elisha Berry*, or that there was any connection between them. The court,



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(STEPHEN, C. J. and KEY, A. J.,) however, overruled the objection, and suffered the said paper to be read to the jury. To which opinion of the court, permitting the said paper to be read to the jury, the defendant excepted.

2ND EXCEPTION. After the evidence mentioned in the preceding bill of exceptions, (and which is to be considered part of this exception,) had been offered by the plaintiff, the plaintiff further proved, that the negroes replevied in this cause, are part of those mentioned in the said agreement, and that immediately on the execution of the said agreement, the said negroes so replevied, were delivered into the possession of the said plaintiff, and remained with him until the spring of the year 1840, when they ran away, and came to the possession of *Elisha Berry* and the defendant. The defendant thereupon insisted, that upon all the preceding evidence, the plaintiff had not shewn himself entitled to recover in the present action.

1. Because he had not shewn that he had performed or offered to perform the covenants to be performed on his part, and

2. Because his remedy, if he has any, is by an action of debt or covenant on the said agreement, and prayed the court to instruct the jury accordingly. But the court (STEPHEN, C. J. and KEY, A. J.,) overruled the objection and refused the instruction. The defendant excepted.

3RD EXCEPTION. This being an exception by the plaintiff below, who did not appeal, is not decided by this court, but inserted as containing a part of the evidence.

At the trial of this cause, after the evidence in the preceding exceptions, which by agreement is to be taken as part of this exception, the plaintiff to maintain the issues on his part joined, offered in evidence to the jury, the articles of agreement bearing date the 1st day of January 1837, having first proved their due execution by the plaintiff and the defendant *Elisha Berry*.

The plaintiff also proved, that on the day of the execution of the said paper, the negroes in controversy in this cause, were in virtue of said agreement, put into the possession of the plaintiff, and that they remained in his possession until the

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spring of 1840, when they ran away, and were in the possession of the said defendants *Elisha Berry* and *R. W. Brooke*, when the writ of replevin issued in this cause. The plaintiff also proved, that for some eight or ten years prior to the execution of said paper, the negroes replevied in this cause, were in the possession of *Elisha Berry*.

The defendant then, in support of the issues on his part joined, offered to read in evidence to the jury, a deed of trust from *Elisha Berry* to the defendant *R. W. Brooke*, dated 24th February 1840, which is as follows :

This indenture made this twenty-fourth day of February, in the year of our Lord one thousand eight hundred and forty, between *Elisha Berry*, of, &c., and *Robert W. Brooke*, of, &c., witnesseth, that for and in consideration of the sum of, &c., to him in hand paid by the said *Robert W. Brooke*, the receipt, &c., he the aforesaid *Elisha Berry*, hath given, granted, &c., and by these presents doth give, &c., unto the said *Robert W. Brooke*, his heirs and assigns, all that tract or parcel of land called and known by the name of *Good Luck* or *Springfield*, upon which the said *Elisha Berry* now resides, lying and being in the county, together with all and singular the buildings, &c., and all the estate, right, title and interest whatsoever of him the said *Elisha Berry*, which he hath, either in law or equity, of, in and to, &c., &c.; together with all my slaves, that I have now in my possession, to wit, &c.; together with all my household and kitchen furniture, and all the farming utensils, and all the plantation stock; as also the whole or whatsoever portion or portions of the estate of the late *Nancy Berry*, deceased, which is devised to me in her will, and to which I may be entitled to in the distribution of her estate, whether real or personal, now or at any time hereafter, whatsoever consisting. To have and to hold all the aforesaid tracts, parts or parcel of land, and all the said negroes and slaves, household and kitchen furniture, plantation stock, goods and chattels, whether in possession, remainder or reversion, unto him the said *Robert W. Brooke*, his heirs and assigns forever. In trust, nevertheless, to have and to hold the above described

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real and personal property forever, in trust, to and for the use, intent and purpose, that is to say, for the use of my five children, *Mary Ann Brooke*, &c.; nevertheless, to have and to hold unto him the said *Robert W. Brooke*, his heirs and assigns, the rents, issues and profits of the aforesaid parts or parcels of land, together with all the profits which may in any manner issue out of, or appertain to all or any part of the above described land, goods and chattels, to and for the use of the said *Mary Ann Brooke*, *Louisa Berry*, *William Berry*, *Nancy Berry* and *Eliza Berry*. And the within *Elisha Berry* himself, be well supported as long as he may live, out of the within named real and personal estate heretofore named in said deed, and for no other use or behoof whatsoever; and the aforesaid *Elisha Berry*, for himself and his heirs, executors and administrators, doth covenant and agree with the said *Robert W. Brooke*, his heirs and assigns, that he the said *Elisha Berry*, and his heirs, the aforesaid tracts, parts or parcels of land, hereby granted, bargained and sold, with the appurtenances hereunto belonging, to him the said *Robert W. Brooke*, his heirs and assigns, against the said *Elisha Berry*, and his heirs, and all claiming under him or them, any right, title or interest in and to the same, or any part thereof, shall and will, and by these presents forever warrant and defend. In testimony whereof, I have hereunto set my hand and seal, the day and year above written.

ELISHA BERRY, (Seal.)

Signed, sealed and delivered in the presence of us,

*John Anderson, Thomas Clements.*

The said deed embracing the negroes in controversy. And further offered to prove by credible witnesses, that sometime in March 1840, the defendant *R. W. Brooke*, called on the plaintiff, and stated to him, that he had obtained a deed of trust from *Elisha Berry* to him, of all the property of *Elisha Berry*, in the possession of the plaintiff, and that he came to demand the land, negroes, farming utensils, and all other property of *Elisha Berry*, then in the plaintiff's possession, and that the palintiff said, there are the negroes, go and take them, I have no title to them, but I will not give up the land; and also



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proved, that two of the negroes in controversy, were then in view of the parties at work with other negroes, proved to have been the property of *Elisha Berry*.

The plaintiff then to rebut the evidence so offered by the defendant, offered to prove by a competent witness, that after the execution of the said deed of trust, and after the said negroes were replevied in this suit, he the witness, was in company with *Elisha Berry* at his house, together with the plaintiff, when *Elisha Berry* told plaintiff in the presence of witness, that he had never authorised the defendant *Brooke*, to interfere with the plaintiff's possession of said negroes, and that he did not design by the deed of trust aforesaid, to authorise said *Brooke* to interfere with the possession of any property embraced in the articles of agreement of January 1837.

The defendant, by his counsel, objected to the admissibility of said testimony, so proposed to be offered by the plaintiffs, upon the ground that said evidence would conflict with his said deed of February 1840, and that the grantor in said deed, after its execution, could not by any act or declaration of his, impair the rights of the grantee, or of the parties beneficially interested therein, and the court being of that opinion, excluded said proof from the consideration of the jury; from which opinion of the court, and their refusal to permit said proof to go to the jury, the *plaintiff*, by his counsel, prayed leave to except.

4TH EXCEPTION. After the evidence contained in the preceding exceptions, and which are made part of this exception, had been offered to the jury, the plaintiff offered to prove by *Elisha Perry*, a competent witness, that immediately after *Robert W. Brooke* had demanded the property in question from the plaintiff, as proved in the preceding exceptions, and on the same day, the said *Robert W. Brooke*, *William F. Berry*, the witnesses by whom the demand was proved, and the said *Elisha Perry*, went together to the residence of *Elisha Berry*, distant about four miles from the place where the demand was made; that *R. W. Brooke* went after *Elisha Berry*, and when they were all together, a conversation ensued, in which *William F.*

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*Berry* asked *Elisha Berry*, in the presence of *Robert W. Brooke*, whether he had authorised *Robert W. Brooke*, to demand or interfere with the property mentioned in the said agreement of January 1837, and *Elisha Berry* replied, that he had not authorised him to take possession of, or interfere with that property, and that he only designed by the deed of February 1840, to give him present control over the property at *Springfield*, and to convey his residuary interest in the property in *William F. Berry's* possession.

The defendant objected to the admissibility of this evidence, on the ground that it would conflict with the said deed of February 1840, and because the grantor in that deed, could not after its execution, by any act or declaration of his, impair or affect the rights of the grantee, or of the parties beneficially interested therein; but the court overruled the objection, and permitted the said evidence to go to the jury. The defendant excepted.

The verdict being for the plaintiff, the defendant took this appeal.

The cause was argued before ARCHER, DORSEY, CHAMBERS and SPENCE, J.

By J. JOHNSON and T. F. BOWIE for the appellants, and  
By T. G. PRATT and C. C. MAGRUDER for the appellee.

ARCHER, J., delivered the opinion of this court.

The inadmissibility of the evidence of the articles of agreement set out in the first bill of exceptions, was put in the court below, upon the ground that there existed no privity between *Brooke* and *Elisha Berry*, or that he claimed title under *Elisha Berry*; this could certainly furnish no justifiable ground for the rejection of the evidence. If the articles of agreement furnished evidence that *Elisha Berry's* title had passed to the plaintiff, (the plaintiff having first shown that *Elisha Berry* had title,) they established his right to recover against the defendant, whether the defendant claimed title under *Elisha Berry* or not, and whether he had any connexion with *Berry* or not.

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If a contrary doctrine prevailed, every wrong-doer would defend himself against a plaintiff's title, however clearly made out, if he could establish the fact that he were not in privity with the party from whom the plaintiff deduced his title. Such a doctrine would be subversive of all the principles upon which the action is founded. This ground is, however, not insisted upon in this court, but it is said, the articles of agreement should be rejected as evidence, because they are not accompanied with any proof, or offer to prove, or statement of counsel, that they have proof of the identity of the negroes replevied, and the negroes named in the agreement. It is admitted that the question before us is, the admissibility of the evidence, and not the correctness or incorrectness of the particular ground upon which the court below may have decided the question; and it must be admitted, that without some evidence showing the identity of the negroes, the articles of agreement would not establish the plaintiff's title. But having shown title in *Elisha Berry*, these articles of agreement constituted a link in the plaintiff's title, and would or would not be evidence in the cause upon the establishment or failure to establish the identity of the negroes. Before, however, the plaintiff has an opportunity of disclosing his whole case, the evidence is objected to upon a ground which assumes the identity of the negroes, placing the inadmissibility of the evidence upon the want of privity between *Elisha Berry* and the defendant. In such a state of the case, we apprehend the court below were fully justified in acting upon such assumption in forming their judgment on the admissibility of the evidence. But independent of this ground, we think the court were right, because the bill of exceptions contains evidence proper for the consideration of the jury, as to the identity of the negroes. It is proved, that for ten years anterior to the 1st of January 1837, *Elisha Berry* was in possession of the negroes replevied in this suit, to wit, *Bill, John and Hanson*, and the articles of agreement stipulate that *Bill, John and Hanson*, among others, shall be furnished to *Berry*, the plaintiff, and shall remain with him for ten years from the date thereof. Now this was certainly evidence from



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which it could be inferred that the negroes replevied and the negroes in the agreement were the same, unless it were shown on the part of the defendant, that *Elisha Berry* had other negroes of the same name. We therefore think the court were right in their opinion in the first bill of exceptions.

That an action of replevin is an appropriate remedy in this case, we cannot doubt. By the law of *Maryland* it is appropriately applied to all cases in which the plaintiff seeks to try the title to personal property, and recover its possession, and we are clearly of opinion, that the plaintiff was entitled to the possession of these negroes, which had been delivered to him under the agreement, and that his right of possession was not divested by their running away and getting into the possession of the defendants, and that as preliminary to the establishment of such right of possession, no evidence whatever was necessary to be furnished of a performance, or a readiness to perform the agreement on the part of the plaintiff.

The covenants in this deed are independent. The covenant to deliver the negroes to the plaintiff, is first in order of time, for without the negroes the plaintiff could not make a crop to divide according to the agreement, with the defendant *Berry*, and if there had been a failure to deliver the negroes, an action could have been immediately sustained on the covenant. There existed a present and immediate right in virtue of the contract to the possession of the negroes, and the contract was executed by the parties in conformity with this construction, and the plaintiff was entitled to the possession for the whole term of ten years by the express stipulations of the contract. Neither party possessed any power to rescind the contract against the will of the other, nor did the non-performance by the plaintiff on his part (if such were the fact,) destroy the rights which he had acquired under the contract. The casual possession of the negroes acquired by the defendant *Berry*, did not enable him to retain the negroes, and to treat the agreement as a nullity. That it was the intention of the parties to the contract, that possession of the negroes should, immediately on the execution of the agreement, pass to *William F. Berry*, is clear, not

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only from the acts of the parties, but from the terms of the agreement. The negroes are proved to have been immediately delivered, and the agreement stipulates that he shall have them for ten years from the execution of the agreement. The case of *Culver vs. Shriner*, reported in 5 *Harr. & John*. 219, does not militate against our views in this case. On the contrary, they are strengthened by the opinion expressed by the court in that case. The court there say, that "from every part of the articles entered into between the parties, it is most evident that each relied upon the instrument of writing to compel a compliance with their respective stipulations." But in this case no such reliance was placed, so far as regards the delivery of the negroes in controversy. They were to pass upon the execution of the agreement; for, by the terms of the agreement, *William F. Berry* was to be furnished with the property *for ten years from the date of the agreement*. It is apparent that the action of replevin would have been sustained in the case of *Culver vs. Shriner*, if the contract had been executed; for the court say, "if it had appeared that *Shriner* had complied with the contract, that the mother of the children in controversy had been kept on the place where the children were born, and that *Shriner* had got a possession which *Kemp's* executor sought to disturb, then it might be said that the property and every right to the issue passed, for it was both a covenant and a grant." In the case before the court, the right of possession was intended to pass on the execution of the agreement, and according to the agreement the possession did actually pass, and the rights of *W. F. Berry* were thus perfected in the property. No act was to be done by *W. F. Berry*, as preliminary to the accrual of his title. The consideration which he was to give, arose after the crops were made with the hands and implements furnished, and the property thus acquired could not be divested either by a failure to comply with his part of the contract, or by the negroes getting into the possession of *Elisha Berry* by absconding.

The fourth bill of exception is taken upon the admission by the court of a certain conversation passing between sundry

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witnesses and *Elisha Berry*, in the presence of the other defendant *Brooke*, in reference to *Elisha Berry's* design and intention in executing the deed of 1840, in relation to the negroes in controversy. This evidence is objected to as inadmissible upon the ground that no parol evidence can be received to contradict a deed. Had evidence been offered for such a purpose, it would have been clearly inadmissible. But it appears from the evidence detailed in the third bill of exceptions, which is made a part of the one now under consideration, that evidence had been offered on the part of the defendant to show that after the deed had been executed, upon a demand made upon the plaintiff for the negroes in controversy, he had surrendered and abandoned all right to them. The evidence now offered was admissible for the purpose of rebutting the evidence thus offered on the part of the defendant. That he should have sought out *Elisha Berry* immediately after the language attributed to him, and should have demanded of him whether he authorised *Brooke*, the grantee in the deed, to demand or interfere with the property mentioned in the agreement of January 1837, was calculated to induce the jury to believe that he had not surrendered the property, and was proper evidence to be submitted to them, on the question, whether he had or had not abandoned the property.

JUDGMENT AFFIRMED.

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THOMAS M. D. BADEN *et al* vs. THE STATE USE OF WILLIAM CLARKE.—December 1843.

The single bill of a collector of the county, sealed as collector, promising to pay the equitable plaintiff in the action, a sum of money "for value received, with interest, the same being for county paper due for the year 1836-7." HELD: to be sufficient evidence in the absence of contradictory proof, to entitle the plaintiff to a verdict upon the bond of the collector, as well against the principal as his securities.

Such a bill, is an implied admission, that the obligor had collected and received the amount therein mentioned; that the same had been levied, and the levies transferred to the obligee.



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After verdict, upon motion in arrest, the court will presume that sufficient proof was offered to the jury, to enable them to find all the allegations in the pleadings, substantially necessary to support the claim of the plaintiff. The objection that the breaches assigned upon the record, are not sufficiently specific, in stating the names of parties for whom levies were made, and the amounts levied for each person, cannot avail on a motion in arrest.

A party for whom a sum has been levied in the county levies, may make a valid transfer thereof without writing.

Where the assigned breaches are not sufficiently specific, after issue joined upon them the defendant may claim a bill of particulars, to enable him to prepare his defence.

### APPEAL from *Prince George's* County Court.

This was an action of DEBT, brought by the appellee against the appellants, on the 28th September 1837.

The plaintiff declared on the bond of *T. M. D. Baden* and others, dated 18th July 1836, which contained the following condition, viz: "the condition of the above obligation is such, that if the above bound *Thomas M. D. Baden*, appointed collector of *Prince George's* county, shall well and faithfully execute the several duties required of him by law, and shall well and truly account for, and pay to the justices of the levy court, or their order, the several sums of money which he shall receive or be answerable for by law, at such time as the law shall direct, then the above obligation to be void, else to be and remain in full force and virtue in law." The defendants pleaded general performance.

The plaintiffs replied, that at the time of making the writing obligatory aforesaid, and thereafter, the said *Thomas M. D. Baden* was collector of the county charges and public assessments, imposed by law on the inhabitants of the said county, and that before the making of the said writing obligatory, to wit, on the 14th day of July 1836, there was allowed by the justices of the levy court of said county, unto sundry citizens of said county, or others, divers sums of money, for divers services, and so forth, amounting in the whole to the sum of eight hundred and five dollars, current money, which said several sums of money, had by the persons thereto entitled as aforesaid, been transferred and assigned to the said *William*

*Clarke* in the endorsement of the writ issued in this cause mentioned, and for whose use this suit is instituted, whereof the said *Thomas M. D. Baden*, collector aforesaid, afterwards, that is to say, on the day and year aforesaid, at the county aforesaid, had notice. And the said State, by its said attorney, further in fact saith, after the said sums of money had been transferred and assigned to the said *William Clarke*, in manner and form aforesaid, to wit, on the 28th day of July 1837, the said *Thomas M. D. Baden*, as collector aforesaid, accounted together with the said *William Clarke*, of and concerning the said sums of money, and upon that accounting, the said *Thomas M. D. Baden*, as collector aforesaid, was indebted to the said *William Clarke*, in the sum of eight hundred and five dollars, current money aforesaid. And the said *Thomas M. D. Baden*, as collector aforesaid, being so found indebted to the said *William Clarke*, in the said sum of eight hundred and five dollars, current money, then and there passed to the said *William Clarke*, his certain bill obligatory, for the payment thereof with interest, which said bill obligatory, sealed with the seal of him the said *Thomas M. D. Baden*, bearing date the day and year last aforesaid, is herewith brought into court; and the said State, by its said attorney, further in fact saith, that the said several sums of money, so as aforesaid allowed by the justices of the levy court of said county, were assessed, laid and imposed by them on the inhabitants of said county, and the said *Thomas M. D. Baden*, as collector aforesaid, was required by the duties of his office, by reason of the premises, to collect and receive the same, for the use of the said *William Clarke*, to whom the same had been transferred and assigned as aforesaid. And the said State further saith, that although the said *Thomas M. D. Baden*, as collector aforesaid, after making the said writing obligatory, and before the issuing of the writ original, of the said State against the said defendants in this cause, did collect and receive the said sums of money amounting as aforesaid, to the sum of eight hundred and five dollars, current money, assessed, laid out and imposed as aforesaid; yet the said sums of money, or any part thereof, although often thereto required, &c.

The single bill referred to, will be found in the bill of exceptions. The defendants rejoined.

1. And the said defendants, *John R. Baden, &c.*, say, that the said State, its action aforesaid against them, to have or maintain ought not, because they say, that the said *Thomas M. D. Baden*, as collector as aforesaid, in said replication, did not collect and receive the said several sums of money, levies and assessments, mentioned in the said replication, or any of them as stated by the said State; and that the said sums of money, levies and assessments, were not levied and imposed upon the inhabitants of the said county, as stated by the said State, nor were they, or any of them assigned to the said *William Clarke*, as stated in the said replication.

2. And the said defendants further say, by way of rejoinder, that the said *Thomas M. D. Baden*, as collector as aforesaid, did not account with the said *William Clarke*, in manner and form as stated in the said replication; and that he was not then and there found indebted upon said account, for the amount stated in the said replication, or for any other sum of money; and that he did not then and there give the note or bond, in manner and form as stated in the said replication.

3. And the said defendants further, by way of rejoinder, say, that the said note for eight hundred and five dollars, in said replication mentioned, was not given, and does not include the said several levies, assessments and sums of money mentioned in the replication as having been levied, as stated in the said replication, and assigned to the said *William Clarke*, and received and collected by the said *Thomas M. D. Baden*, collector as aforesaid; and that he did not collect and receive the same, or any part thereof, as alleged by the said State.

The plaintiffs sur-rejoined, that the matters and facts contained in the rejoinder of the said defendants are not true, and this the said State prays may be enquired of by the country, and the said defendants in like manner, &c.

The jury found that the said *Thomas M. D. Baden*, as collector as aforesaid, did collect and receive the said several sums of money, levies and assessments mentioned in the re-



plication of the said plaintiff, and that the said sums of money, levies and assessments, were levied and imposed upon the inhabitants of the said county, as also stated by the said plaintiff, and were assigned to the said *William Clarke*, as stated in the said replication. And that the said *Thomas M. D. Baden*, as collector as aforesaid, did account with the said *William Clarke*, in manner and form as stated in the said replication, and that he was then and there found indebted upon said account, for the amount stated in the said replication, and that he did then and there give the note or bond, in manner and form as stated in the said replication of the said plaintiff. And that the said note of eight hundred and five dollars in said replication mentioned, was given for, and does include the said several levies, assessments and sums of money, mentioned in the said replication, as having been levied and assigned to the said *William Clarke*, and received and collected by the said *Thomas M. D. Baden*, collector as aforesaid, and that he did collect and receive the same as alleged by the said State in its said replication. And they do therefore, find the sum of one thousand and fifty-seven dollars and thirty-six cents, current money, really and justly due to the said plaintiff, on the writing obligatory aforesaid.

The defendants moved the court to arrest the judgment in this case, for the following reasons:

1. Because the condition of the bond sued upon, does not cover the breaches assigned in the replication.

2. Because the plaintiff is not entitled to judgment in the present state of the pleadings.

3. Because the breaches assigned in the replication are not within the condition of the bond sued upon.

4. Because the replication should have stated, and set out the names of the several and respective parties, for whose use the several sums of money and levies were made and levied, mentioned and referred to in the replication, and the several amounts levied for each individual and person; and also, because the said replication does not state that these several sums

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and levies were assigned in writing to the said *William Clarke*, as it should have done.

The county court overruled the motion in arrest, and rendered judgment on the verdict.

At the trial of this cause, the plaintiff to sustain the issues joined on its part, offered in evidence to the jury the following paper:

\$805. I promise to pay to *William Clarke*, or order, the sum of eight hundred and five dollars, for value received, with interest, the same being for county paper due for the year 1836-7. Witness my hand and seal, the 28th July 1837.

T. M. D. BADEN, (Seal.)

Test,—*John R. Baden.*

*Collector P. G. County.*

And proved by a competent witness, that the same was signed by the said *T. M. D. Baden*, the collector as aforesaid, at the time it purports to bear date, and there rested its case.

The defendants objected to said evidence, that the same standing alone and unsupported by other evidence, was not sufficient to entitle the plaintiff to a verdict. But the court (*STEPHEN, C. J.* and *KEY, A. J.,*) overruled the objection, and were of opinion, and so instructed the jury, that the said evidence, if believed by them, would be sufficient in the absence of contradictory evidence, to entitle the plaintiff to a verdict on all the issues joined, against all the defendants in this cause. The defendants excepted, and prosecuted this appeal.

The cause was argued before *ARCHER, DORSEY, CHAMBERS* and *SPENCE, J.*

By *T. S. ALEXANDER* and *C. C. MAGRUDER* for the appellants, and

By *R. JOHNSON* and *T. F. BOWIE* for the appellees.

*DORSEY, J.,* delivered the opinion of this court.

It is true that on the first trial of this case, which took place in the county court, the only issue to be tried by the jury was, whether *Thomas M. D. Baden* had collected and received the

sum of money, for the recovery of which, the action was instituted. But do the issues tried by the last jury at all vary, in respect to those issues, the effect and operation ascribed by this court to the testimony adduced by the appellee on the first trial? We think that they do not. If the promissory note or certificate of indebtedness given by *Thomas M. D. Baden*, the collector, was an implied admission that he had collected and received the amount therein specified, it was equally an implied admission that the same had been levied, and the levies transferred to *William Clarke*. Upon no other ground than his acknowledgment of the existence of those facts, can his giving such a note or certificate be accounted for. Such admissions by the collector having been determined by this court, in the first trial before it, to be *prima facie* evidence against the collector and his securities, the county court proceeding with the trial under the *procedendo*, could not do otherwise than overrule the objection made to the testimony; and was fully justified in the instruction which it gave to the jury.

Two reasons have been urged why the judgment of the county court ought to have been arrested. The first is, that “the replication is uncertain in its statement of the persons for whom the levies mentioned therein, were made, and the sums respectively allowed to them.” Whether this objection to the replication, if taken by the proper demurrer, in the court below, should have been sustained, we mean to express no opinion. But as it was taken in arrest of judgment, it was correctly overruled. If as insisted, it was necessary that the replication should state the amount of each levy, and the name of the person for whom it was made; and that proof thereof must be offered to enable the jury to find the verdict which they did; after the finding of the verdict on the motion in arrest, the court are bound to assume, that such testimony was given to the jury however false, in point of fact, that assumption might be. In acting on a motion to arrest the judgment, the court is not to look to the bills of exceptions, or out of the other proceedings in the cause as exhibited by the record, in forming its presumption of the proof which had been submitted to the jury.



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Similar reasons may be assigned for overruling the second ground, relied on for arresting the judgment; which ground was, "that there is no sufficient averment of a legal transfer and assignment of said levies to *William Clarke*, and consequently no title in him, to demand payment thereof." It was not necessary, as has been insisted, that such transfer to be valid, must have been in writing.

If the consequences of the affirmance of this judgment be so disastrous to the interests of the appellants, (the securities) as it has been represented they may be, they certainly had the means of avoiding the dilemma in which, it is said, they are now involved, had they used them at the proper epoch in the cause. Had a special demurrer to the replication, assigning as the grounds of its insufficiency, that it did not state the amounts of the several levies, and the names of the persons for whom made, been overruled by the county court, a knowledge of those facts, so essential to the defence of the securities, could readily have been obtained in time for them to make their defence, and prepare for the trial, by an application to the court for an order requiring the appellee to file a bill of particulars of his claim.

Approving of the conduct of the court below, in overruling the motion in arrest of judgment, and the objection stated in the bill of exceptions, to have been raised to the testimony offered by the appellee, and also approving of the instruction given by the court to the jury, we affirm its judgment.

JUDGMENT AFFIRMED.

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CHARLES DUVALL, vs. SAMUEL PEACH.—*December* 1843.

At a sale of land under execution, P agreed with D, that if D would purchase the land, he the said P, would invalidate certain deeds therefor, and put him in possession. HELD: that this agreement being merely by parol, is void at law under the statute of frauds.

P, at a public sale of lands, the bidding being dull, said, buy the land gentlemen; buy the land D; I will burst the deeds from N; I will give you a

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good title; and will put you in possession of the land; it shall not cost you a cent. Under such representations, D bought the land and paid for it in 1826. In an action brought in 1840, by D against P, to recover back the purchase money upon the ground that P had failed to vacate the incumbrances and put D in possession, there being no proof of any proceedings on the part of P, nor that he had given possession. **HELD:** that the action was barred by limitations.

To remove the bar raised by the statute of limitations, there must be such an acknowledgment of a subsisting debt, as is equivalent to an express or implied assumpsit, or promise to pay.

Where a record of proceedings in Chancery does not appear in the bill of exceptions, this court cannot decide whether the county court erred in rejecting it as evidence or not.

A party in a cause cannot prove by a solicitor in Chancery, that in the opinion of such solicitor, judging by an examination of certain proceedings in that court to vacate conveyances, (without producing the record,) that he had used reasonable diligence to accomplish the object of such proceedings. Parol proof of facts of which the plaintiff had record evidence cannot be given; it is not the best evidence in legal contemplation.

#### APPEAL from *Prince George's County Court*.

This was an action of *Assumpsit*, brought on the 24th March 1840, by the appellant against the appellee.

The plaintiff declared, that whereas, the said *Samuel*, on the 4th December 1826, at, &c., issued a certain writ of *venditioni exponas*, upon a judgment obtained by him, the said *Samuel*, at, &c., against a certain *Nathan Waters*, for the recovery of a large sum of money, to wit, &c., and placed the same in the hands of *George Semmes*, esquire, the then sheriff of said county, directing him thereby to expose to public sale, for the purpose of satisfying said debt and costs, all those tracts or parts of tracts or parcels of land which had theretofore been levied upon, under a certain writ of *fieri facias*, which the said *Samuel* had caused to be issued out of said court, on, &c., at, &c., to wit, one tract of land called *Pasture Enlarged*, &c., &c., all of which said tracts or parts of tracts or parcels of land, were by virtue of said writ of *venditioni exponas*, afterwards, to wit, on the 30th December 1826, at *Prince George's* county aforesaid, by the sheriff aforesaid, exposed to public sale, to the highest bidder; at which said sale, the said *Charles*, then and there became the purchaser, upon the ex-

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press promise and undertaking of him, the said *Samuel*, that if he, the said *Charles*, would purchase the said lands as aforesaid, he, the said *Samuel*, would invalidate the deeds for said lands, which had been before that time executed by the said *Nathan*, to a certain *Nathan J. Waters*, and a certain *Samuel Radcliffe*, under which the said *Nathan J.* and *Samuel Radcliffe*, claimed to hold the same as their property, and would put the said *Charles* in possession of said lands, so as aforesaid purchased by him; and the said *Charles* in fact saith, that the said *Charles*, confiding in the promise and agreement of the said *Samuel*, so as aforesaid, then and there made, then and there became the purchaser of the said tracts, parts of tracts or parcels of land; for a large sum of money, to wit, thirteen hundred and fifty dollars, current money, which said sum of money, the said *Charles*, on the aforesaid 30th day of December 1826, paid to a certain *Richard Peach*, the agent and attorney for the said *Samuel Peach*. But the said *Samuel*, not regarding or fulfilling his said contract or agreement, by vacating or annulling the said deeds, or either of them, and hath not yet put the said *Charles* in possession of the said lands, so as aforesaid purchased by him, or any part thereof, but to perform his said contract or agreement in that respect, he hath hitherto altogether refused, and still doth refuse to perform the same.

2ND COUNT. And whereas also, the said defendant, heretofore, to wit, on the 30th December 1826, did encourage and persuade the said plaintiff to buy at the sheriff's sale in the first count mentioned, the tracts, parts of tracts and parcels of land also therein mentioned, and in consideration that the plaintiff would purchase the said lands at the said sale, the said defendant undertook and faithfully promised the plaintiff, that the said lands were the proper lands of *Nathan Waters*, also therein mentioned, and warranted the said lands to belong to the said *Nathan Waters*, and undertook and promised, that he, the said defendant, would set aside, invalidate and annul certain deeds for the same, also in the first count mentioned, and put said plaintiff in possession thereof, and give him a good



title thereto, without any cost or charge to him, and by means and in consequence of the said promises and undertakings, and warranty, and relying on, and confiding in the same, the said plaintiff became the purchaser of the said lands, at the said sale, at a large price, to wit, \$1,350, which he then and there paid to the authorised agent and attorney of the said defendant; whereas, the said lands in truth and fact did not belong to the said *Nathan Waters*, but to the said *Nathan J. Waters*, and *Samuel Radcliffe*; and the said *Nathan J.* and *Samuel*, were afterwards, to wit, on the day and year aforesaid, at the county aforesaid, impleaded by the said plaintiff, with the knowledge, consent and approbation of defendant, in the High Court of Chancery, for trying the title to said lands, and to put the plaintiff in possession thereof, in pursuance of said undertakings and promise, and warranty, and the said cause was so proceeded in, that afterwards, at the December term 1839, of the Court of Appeals for the Western Shore of Maryland, (to which court said cause was carried on appeal,) upon a final hearing and decision of said cause upon the merits thereof, the said deeds were not vacated, annulled and invalidated, but the proceedings instituted for that purpose were decreed to be dismissed, and in the prosecution of said cause in the Court of Chancery, and in the Court of Appeals, the said plaintiff has expended a large sum of money, to wit, two thousand dollars, and the said deeds have not, nor have any of them been set aside, invalidated or annulled, nor has a good title thereto been made to the plaintiff by the defendant, or any other person, by reason whereof the said plaintiff has lost the said sum of \$1,350, so paid as aforesaid, for the said lands, and the further sum of \$2,000, expended as aforesaid in trying the title to said lands, and is otherwise prejudiced and injured, and has damage to the value of \$5,000, and therefore sues, &c.

3RD COUNT. And whereas also, the said *Samuel*, afterwards, that is to say, on the 20th of March 1840, at the county aforesaid, was indebted to the said *Charles*, in another sum of \$1,350, current money, for the like sum of money by the said *Samuel*, before that time had and received, to and for the use

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Duvall vs. Peach.—1843.

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of the said *Charles*, and also, for a like sum of money, before that time lent and advanced to, and paid, laid out and expended, by the said plaintiff, for the said defendant, and at his special instance and request, and being so indebted, he, the said *Samuel*, in consideration thereof, afterwards, that is to say, on the day and year last aforesaid, at the county aforesaid, undertook, and then and there faithfully promised to the said *Charles*, to pay him the said mentioned sums of money, when he should be thereto afterwards requested. Nevertheless, &c.

The defendant pleaded non-assumpsit and limitations, on which issues were joined.

1ST EXCEPTION. At the trial of this cause the plaintiff to maintain the issue on his part joined, proved to the jury, that at the April term 1824 of *Prince George's* county court, *Samuel Peach*, the defendant in this cause, recovered a judgment against a certain *Nathan Waters* and the other parties to it, upon a bond given to him as trustee.

SAMUEL PEACH vs. NATHAN WATERS. April 12th, judgment for \$14,485, debt and costs, to be released on payment of \$7,247.87½, with interest from 21st September 1811, till paid, and costs. Cr. By \$1,400, 29th March 1822. By \$1,105.89, 3rd April 1824.

And that process of execution issued from said court for the purpose of making the money due on said judgment, which came to the hands of the sheriff of *Prince George's* county, and was levied upon certain lands as the property of the said *Nathan Waters*; and the plaintiff proved by *Richard W. Isaac*, a competent witness, that he was deputy sheriff, and charged with the execution of said process, and caused the said lands to be advertised for sale on the 30th day of December 1826; that on the day before the said sale was to take place, witness went to the defendant to know whether it would be necessary for him the witness to attend the said sale, and whether he the defendant would attend; that the defendant informed witness that he would not attend the sale, but his brother *Richard Peach*, would come from *Annapolis* and attend the sale for him the defendant, and that he the defendant had fully authorised his

said brother to settle the business, and that he would be satisfied with whatever settlement his brother made in relation to the business. On the day of the sale *Richard Peach*, who was proved to be the attorney for defendant, and who obtained the judgment, was present, and the bidding being dull, he said, "buy the land gentlemen;" "buy the land doctor," (speaking to the plaintiff,) "I will burst the deeds from *Nathan Waters* to *Nathan J. Waters* and *Samuel Radcliffe*; I will give you a "good title, and I will put you in possession of the land, and it shall not cost you a cent." And plaintiff became the purchaser of said lands for the sum of \$1,350. And witness further stated, that he did not receive any part of the purchase money, but that the said *Richard Peach*, as attorney, gave him a receipt on the day of sale in satisfaction of the said execution, stating at the same time, that he and the purchaser would settle about the purchase money among themselves. Witness further proved, that he called on defendant some time in the year 1827 or 1828, in relation to the payment of the poundage fee due on said execution, when defendant informed him, that the purchase money for said lands had been paid, and the land settled for. Witness further stated, that he called on defendant the day before said sale as above stated, because he believed there would be no sale of said property, unless the said defendant attended at said sale. No person had bid for the land, until the said *Richard Peach* had made the above declarations, and shortly after they were made, the said lands were knocked off to the said *Charles Duvall*, as the highest bidder. And the plaintiff further proved by competent testimony, that the defendant in this cause was examined under oath, in virtue of a commission issued in 1837, from the Court of Chancery, in a cause wherein the plaintiff in this case was complainant, and *Nathan Waters* and others were defendants, instituted by the plaintiff, for the purpose of vacating the deeds heretofore referred to, and upon said examination, and in conversations with the witness, defendant stated, that he was satisfied with the application of the purchase money by said *R. Peach*, and



the said witness upon cross examination stated, that in said conversations, he understood defendant to say, that his brother *Richard Peach*, had acted as his attorney. The said deputy sheriff also proved on cross examination, that on the day of sale, *R. Peach* did not represent himself as the agent of the said defendant, and that he did not hear the defendant's name mentioned on that day.

The defendant thereupon prayed the court to give the jury the following instructions :

1. That *Richard Peach*, as the mere attorney of *Samuel Peach*, had no authority to make the contract declared on in this cause.

2. That if the jury shall believe from the evidence, that *Richard Peach* did enter into the agreement mentioned in the declaration, that said agreement is not binding on *Samuel Peach*, unless the jury shall further find from the evidence, that *Richard Peach* was authorised by *Samuel Peach*, to make as his agent such a contract, and that he did, in pursuance of such authority, actually make the contract as the agent of the defendant.

3. That the alleged contract being a contract concerning lands, would not be binding on *Samuel Peach*, unless it was reduced to writing, and signed by *Samuel Peach*, or by some agent thereunto by him lawfully authorised.

4. That the said contract was not, in the contemplation of the parties, to be completed within one year from the date thereof; then that the same was void, unless reduced to writing, and signed by *Samuel Peach*, or his lawfully authorised agent.

The court (STEPHEN, C. J. and KEY, A. J.) granted the first, second and third prayers, but refused to grant the fourth prayer. The plaintiff excepted to the instructions granted.

2ND EXCEPTION. Upon the evidence contained in the preceding bill of exceptions, which is to be considered as part of this exception, the plaintiff prayed the court to instruct the jury, that if they should find from the evidence, that there was an agreement between the plaintiff and *Richard Peach*, as the authorised agent of the defendant, and in virtue of said agree-

ment the plaintiff purchased the land, as stated in the preceding exception, and paid the purchase money to the said defendant or his agent, and that the said agreement had not been complied with on the part of the defendant, that the plaintiff is entitled to recover upon the count for money had and received, although they should find that the said agreement was not in writing, and signed by the defendant, or some person by him fully authorised; which instruction the court gave. The defendant by his counsel, thereupon prayed the court to instruct the jury, that if they should find from the evidence, that the agreement was made, and the purchase money paid on the 30th December 1826, and that the original writ in this cause did not issue until the 1st day of March 1840, that then the action is barred by limitations, unless they should find some subsequent assumption or promise by the defendant, either to repay the money or perform the said contract, and they must find for the defendant; which prayer the court granted, and gave the instruction accordingly. The plaintiff excepted.

3RD EXCEPTION. In addition to the testimony contained in the preceding bills of exceptions, and which is to be considered as part of this bill of exceptions, the plaintiff, for the purpose of removing the bar of the statute of limitations, offered to prove by *Thomas F. Bowie*, esquire, an attorney and counselor at law and solicitor in chancery, a competent witness in this cause, that he is acquainted and familiar with the practice and course of proceedings in courts of law and chancery in *Maryland*, and that he has examined certain records of proceedings instituted in *Prince George's* county court, the Court of Appeals, and the Court of Chancery, by the plaintiff in this action, first, for the purpose of getting possession of the lands mentioned and referred to in the preceding evidence, and afterwards, for the purpose of vacating and annulling certain deeds for the said lands from *Nathan Waters* to *Nathan J. Waters*, and *Samuel Radcliffe*, and that he was solicitor for said *Duvall* in said cause and proceedings from the year 1835 to 1839, and that from the knowledge of the course and manner of said proceedings in the said county court, Court of Chancery, and

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Duvall vs. Peach.—1843.

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the Court of Appeals, and in his opinion, judging by his examination of the said proceedings instituted and conducted by the plaintiff as aforesaid, the said plaintiff had used reasonable diligence in his efforts to acquire possession of the said lands under the said purchase and agreement, and to set aside and vacate said deeds, and procure a good title to the same. And the plaintiff further offered to prove by the said witness, that the said proceedings were first commenced by the said *Duvall*, the plaintiff in this case, in the year 1827, or 1828, or 1829, as he knows by inspection of the record, and were continued by him in the county court, Court of Chancery, and Court of Appeals, continuously down to the year 1839. And the said plaintiff also offered in evidence, a duly authenticated record of the proceedings in the Court of Appeals, on an appeal from Chancery, wherein the said *Charles Duvall* was complainant, and the said *Nathan Waters* and others were defendants, in which cause the validity of said deeds had been in issue in the said courts between the present plaintiff claiming under the sheriff's sale and agreement aforesaid, and those claiming title to the said lands under the aforesaid deeds, for the purpose of shewing when said proceedings commenced and ended, and that the issues involved in the cause embraced the validity of said deeds. But the defendant, by his counsel, objected to the admissibility of the said evidence, which objection the court sustained, and refused to permit any of the said evidence to go to the jury. The plaintiff excepted.

The verdict and judgment being against the plaintiff, he prosecuted this appeal.

The cause was argued before ARCHER, DORSEY, and SPENCE, J.

By DIGGES and TUCK for the appellants, and

By PRATT and C. C. MAGRUDER for the appellee.

SPENCE, J., delivered the opinion of this court.

After a careful examination of the several legal propositions decided by the county court and brought up to this court for revision, we are prepared to say, that in them we find no error.



The first and second propositions under the first bill of exceptions appear to us so manifestly clear, that we find great difficulty in suggesting arguments or reasons which will render their correctness more conclusive.

The third proposition arising under the first bill of exceptions, raises the question, whether the agreement set out in the declaration and relied on by the plaintiff, is such an agreement as is within the statute of frauds. The parol agreement, or rather that part of the agreement relied on, to charge the defendant as set out in the plaintiff's declaration, is as follows, viz: "At which said sale, the said *Charles* then and there became the purchaser, upon the express promise and undertaking of him the said *Samuel*, that if he the said *Charles* would purchase the lands as aforesaid, he the said *Samuel* would invalidate the deed for said lands, which had been before that time executed by the said *Nathan* to a certain *Nathan J. Waters* and a certain *Samuel Radcliffe*, under which the said *Nathan J.* and *Samuel Radcliffe* claimed to hold the same as their property, and would put the said *Charles* in possession of said lands so as aforesaid purchased by him; that the said *Charles* confiding in the promise and agreement of the said *Samuel*, so as aforesaid, then and there made, then and there became the purchaser, &c."

We are fully persuaded that this agreement falls entirely within that class of cases which the authorities determine to be agreements within the statute of frauds, and in principle almost identical with *Lamborn vs. Watson*, 6 H. & J. 252.

The second exception presented a question under the statute of limitations. The court instructed the jury, "that if they should find from the evidence that the agreement was made and the purchase money paid on the 30th December 1826, and that the original writ in this cause did not issue until the 1st day of March 1840, that then this action was barred by limitations, unless they should find some subsequent assumption or promise by the defendant, either to re-pay the money or perform the said contract." In *Maryland*, to remove the bar raised by the statute of limitations, there must be such an

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Keefer vs. Mattingly.—1843.

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acknowledgment of a subsisting debt, as is equivalent to an express or implied assumpsit or promise to pay.

This court cannot decide whether the county court erred in refusing to let the record of the proceedings in the Court of Appeals, on an appeal from Chancery, wherein *Charles Duvall* was complainant and *Nathan Waters* and others were defendants, go to the jury, because that record is not made a part of the third bill of exceptions, nor is it in the record; but we think the county court did not err in refusing to let the testimony of *Thomas F. Bowie* go to the jury, because that was parol evidence of facts of which the plaintiff had record evidence, and therefore was not the best evidence in legal contemplation.

JUDGMENT AFFIRMED.

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E. R. AND F. KEEFER vs. WILLIAM H. MATTINGLY.—Dec.  
1843.

This court is limited by the act of 1825, ch. 117, to the consideration of the questions presented to the county court upon the bills of exceptions.

An instrument of writing in the following words, viz: "we hereby bind ourselves to pay W all that we receive over \$400 of the C. and O. C. company in our cases against said L and M," signed by the defendant, does not *per se* contain evidence of a consideration.

But the connexion of this paper with other proof leading to the inference, that the plaintiff in the action had forborne to defend certain actions depending at the time of its execution, and in consequence of, and reliance upon it, allowed judgments to be rendered, is sufficient evidence of a consideration for its execution, proper to be left to the jury.

The court is the proper tribunal to construe and determine the legal effect and construction of instruments of writing: but where deductions are to be drawn from the conduct of parties in the execution of such instruments, at the time, in the manner, and under the circumstances existing in the case, the jury are the proper forum to make such deductions.

L assigned to M his claim against the C. and O. C. company. At this time K had an attachment pending against the funds of L, in the hands of the company, and shortly afterwards agreed to pay M all sums he should receive over and above the sum of, &c. In an action by M against K to recover such surplus, the assignment from L to M is admissible evidence, as a basis for the introduction of the agreement between M and K, and calculated to explain the reasons for that agreement.

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 Keefer vs. Mattingly.—1843.
 

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 APPEAL from *Frederick County Court*.

This was an action of *Assumpsit*, commenced on the 30th August 1841, by the appellee against *Ezra R. and Michael Keefer*, partners, trading under the firm of *E. R. & M. K.* The plaintiff declared upon an indebtedness for sundry articles and matters properly chargeable in account; and upon the money counts. The defendant pleaded non-assumpsit, on which issue was joined.

1ST EXCEPTION. At the trial of the cause, the plaintiff, to support the issues joined on his part, offered in evidence to the jury, short copies of two judgments of condemnation, rendered in the Circuit Court of *Washington county*, in the *District of Columbia*, against the *Chesapeake and Ohio Canal Company*, accompanied with a letter from *Brent and Brent*. They then offered in evidence by *Thomas Turner*, a competent witness, that on the 16th day of December 1840, *Ezra R. Keefer*, one of the plaintiffs in said judgment, (and who was admitted to be one of the firm of *E. R. & M. Keefer*,) received on said judgments from the canal company, the sum of \$1,217, in full of said judgments, which receipts are annexed to said judgments, the execution of which receipts are admitted.

CIRCUIT COURT OF WASHINGTON COUNTY, *District of Columbia*. *Michael Keefer and Ezra R. Keefer vs. The Chesapeake and Ohio Canal Co., garnishees of Leckie and Mattingly*. November term 1840. 14th December, judgment of condemnation for \$744.06, and costs. Costs, \$15.63.

	Test,	W. BRENT, Cl'k.
Dec. 15th 1840.	Examined and passed,	
\$744 06		J. McPHERSON,
445 52		JACOB MARKELL.
<hr/>		
1,189 58		
5		
<hr/>		
\$59.47,90		



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 Keefer vs. Mattingly.—1843.
 

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 COURT ROOM, *Washington City*, Dec. 14, 1840.

Gentlemen,—The short copy above and the one on the other side, will enable you to receive the amounts or the judgments from the *Chesapeake and Ohio Canal Company*. Our fee is five per cent. upon the amount, which will be \$59.47. The costs in both suits amount to \$28.50, from which deduct \$10 deposited, will leave \$18.50, which added to our fee, will make \$77.97, which please to forward to us by a check on one of our banks, or enclose to us in notes of your bank, evidenced by some person to have been placed in the post office.

Yours respectfully, BRENT &amp; BRENT.

 Addressed to *Messrs. E. R. and M. Keefer, Frederick town*.

CIRCUIT COURT, WASHINGTON COUNTY, *District of Columbia*. *Michael Keefer and Ezra R. Keefer vs. The Chesapeake and Ohio Canal Co., garnishees of Samuel A. Leckie and William Mattingly*. November term 1840. 14th December, judgment of condemnation for \$444.52, and costs. Costs \$12.87.

Test, W. BRENT, Clk.

December 15th, 1840. Examined and passed,

\$59 47	12 87	J. McPHERSON,
18 50	15 63	JACOB MARKELL.
<hr/> \$77 97	<hr/> \$28 50	

Received December 16th 1840, in full of the annexed judgments, twelve hundred and seventeen dollars and ninety cents, of *Thomas Turner, Clk. C. & O. C. Co.* in scrip of December 9th, payable 9 months after date, with interest.

E. R. &amp; M. KEEFER.

Passed by order of the board 15th December, 1840.

THOS. TURNER, Clk.

 CANAL OFFICE, *Frederick*, July 1, 1843.

I certify the foregoing to be a true copy of an original paper on file in this office. Test, THOS. TURNER,

1st Judgment \$744 06

Clk. C. &amp; O. C. Co.

Cost 15 63

2nd. do. 444 52

Cost 12 87

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 \$1,217 08

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Keefer vs. Mattingly.—1843.

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The plaintiff then further to support the issue on his part joined, offered in evidence the following paper, the due execution of the same by *E. R. & M. Keefer*, the firm aforesaid, having been admitted :

FREDERICK, December 11, 1840.

We hereby bind ourselves to pay *William H. Mattingly* all that we receive over \$400 of the *Chesapeake and Ohio Canal Company*, in our cases against said *Leckie* and *Mattingly*.

E. R. & M. KEEFER.

The plaintiff then offered in evidence to the jury, a paper purporting to be an assignment from *S. H. Leckie* to *William H. Mattingly*, the plaintiff, of all the right, title and interest of him the said *S. H. Leckie*, of and in all his claims against the canal company, the execution of which paper is admitted, viz :

“For value received, I hereby assign, transfer and convey unto *William H. Mattingly*, his executors, administrators or assigns, all claims and demands, both at law and in equity, which I now have or may at any time heretofore have had, against the *Chesapeake and Ohio Canal Company*, arising under my contract with said company, for the construction of section No. 279 of the canal, and all my interest in the suit pending in my name against the said company in the Circuit Court for *Washington* county, in the *District of Columbia*, and in judgment or judgments which may be obtained in said suit; and all my interest in the 20 per cent. or “back money” retained out of the estimates for work done on said section, by the undersigned and the said *Mattingly*, as partners; and finally, all my right, title and interest of every description, appertaining to said section, and all my claims of every kind against the said company. In witness whereof, I have hereunto set my hand and affixed my seal, this third day of October, in the year of our Lord one thousand eight hundred and forty.

S. H. LECKIE, (Seal.)”

To the admissibility of which last paper the defendant objected, but the court (*BUCHANAN, C. J.*, and *BUCHANAN, A. J.*) overruled the objections and admitted the said paper to be read to the jury. The defendants excepted.

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Keefer vs. Mattingly.—1843.

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2ND EXCEPTION. In this case, the defendants by their counsel, upon the evidence offered in the first bill of exceptions, which is to be taken as part of this their second bill of exceptions, prayed the court to instruct the jury, that upon all the evidence offered to the jury, the plaintiff is not entitled to recover, because there is no sufficient consideration for the promise or agreement made by *Ezra R.* and *Michael Keefer* to pay to *William H. Mattingly* all they might receive over \$400 of the *Chesapeake and Ohio Canal Company*, in their cases against *Leckie* and *Mattingly*; but the court were divided in their opinion as to the direction prayed for as aforesaid; wherefore they did not give the opinion and direction prayed for by the defendants. The defendants excepted.

The verdict and judgment being for the plaintiff, the defendant prosecuted this appeal.

The cause was argued before STEPHEN, ARCHER, CHAMBERS and SPENCE, J.

By PALMER for the appellants, and

By F. A. SCHLEY, DULANY and ADDISON for the appellees.

ARCHER, J., delivered the opinion of this court.

Various questions have been discussed in this cause, which we think do not legitimately arise on the record. We are limited by the law of 1825, chap. 117, to the consideration of the question presented to the court below. To this we shall confine our judgment. The court were called upon to say, there was no sufficient evidence of a consideration proved in the case. The writing signed by the defendants binding themselves to pay to the plaintiff whatever sum they should receive in their cases against *Leckie* and *Mattingly*, of the *Chesapeake and Ohio canal company*, does not in itself contain evidence of a consideration, and if the action had been founded on this instrument, it would have been necessary to have had proper averments of a consideration. By the evidence offered by the plaintiff, it appears that the defendants had instituted two actions by attachments in the Circuit Court for the county of



*Washington*, in the *District of Columbia*, against *Leckie* and *Mattingly*, and laid the same in the hands of the *Chesapeake and Ohio Canal Company*, which actions had been instituted to the November term of that court in the year 1840, and were depending at the time of the execution of the writing referred to. The claim of the defendants in those actions amounted as is demonstrated by the judgments obtained, to the sum of \$1,189.85. That the writing refers to these cases is obvious by the designation of the parties, and the absence of evidence of any other controversy depending in any court between the parties. From this writing it may be inferred, that the extent of the defendant's claim in those suits was adjusted, and the balance ascertained to be due them was \$400. Then the defendants, by the same writing, bind themselves to pay to the plaintiffs all over the \$400 which they should receive from the canal company in these cases. Two days after this, a judgment of condemnation is entered for the whole extent of the claim, and canal scrip on the fourth day after the agreement, is received for the whole amount of the judgments. Is it not a legitimate inference from these proceedings of the parties, that *Mattingly* forebore to defend the attachment cases in the circuit court, and in consequence of the agreement and in reliance upon it, allowed the judgment to go against the canal company? If but \$400 was due the plaintiffs from *Leckie* and *Mattingly*, they might successfully have resisted the condemnation beyond that sum, which they forebore to do, in consequence of the agreement relying on the defendant's willingness and ability to pay them whatever they should recover of the canal company, beyond the \$400. We think therefore there was sufficient evidence of a consideration proper to be left to the jury. The court it is true, is the proper tribunal to construe and determine the legal effect and construction of instruments of writing; but when deductions are to be drawn from the conduct of the parties in the execution of such instruments, at the time, in the manner, and under the circumstances, existing in the case, the jury are the proper forum to make such deductions. We therefore think it was properly a

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Lee vs. Hoye.—1843.

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question for the jury to determine whether a consideration existed in the case, and there was sufficient evidence before them for this purpose.

We also think the court were right in allowing the assignment from *Leckie* to *Mattingly* to be offered in evidence. It formed a proper basis for the introduction of the agreement of the defendants which was offered in evidence, and was calculated to explain the reason for the defendants contracting entirely with the plaintiff in relation to the surplus over \$400, to be received by the defendants on their attachments against *Leckie* and *Mattingly*.

JUDGMENT AFFIRMED.

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DUDLEY LEE vs. JOHN HOYE'S LESSEE.—December 1843.

Extracts from record books deposited in the land office, showing the name and rank of grantee, and number of the lot and acres, with a particular description of such lot as surveyed, to which an officer or soldier of the Revolution was entitled, which books purport to have been made under the authority of the act of 1788, ch. 44, with a certificate from the register of the land office, under his seal of office, that the same have been carefully collated and compared with the original record books from which they were respectively taken and agreed therewith, are sufficient evidence to show title in the person named in such extracts, to the lot therein described.

An escheat grant is *prima facie* evidence of title, and is available for that purpose until the contrary is proved.

It is not necessary nor usual, according to the practice of the land office, to state on the face of an escheat patent whose lands were escheated, or the facts or circumstances which shew that the lands were escheatable.

A patent which professed to grant, as escheat, several parcels of land which it described, with contiguous vacancy, cannot include, as such vacancy, another parcel of land which appeared to have been theretofore granted by the State, and not enumerated as one of the parcels escheated.

The court will not instruct the jury after a lapse of seventeen years merely, to presume the death of the patentee of land.

A death of a patentee will not be presumed to support a title to land, acquired in violation of the law, and rules of the land office.

Before a title can be acquired in lands liable to escheat, the rules of the land office require that two-thirds of the value of the land be paid to the State.

A warrant of resurvey should be founded upon a siezin in fee in the lands upon which the resurvey is to be made.

A partial possession of land, with a general claim of title for fifteen years, will not authorise the presumption of a conveyance to such claimant.

APPEAL from *Allegany* County Court.

This was an action of *Ejectment*, for a tract of land called *Flavia*, brought on the 10th February 1840. The demise was laid on the 1st January 1839.

The defendant pleaded *non cul*, and took defence according to his pretensions, as they shall appear to be laid down on the return of a warrant of re-survey to be issued in this cause, &c.

1ST EXCEPTION. The plaintiff to support the issue on his part joined in this case, offered in evidence the plats and explanations. He also offered in evidence the following certificates and extracts from the books of the land office:

STATE OF MARYLAND, *Sct*: I, *George G. Brewer*, register of the land office for the Western Shore of the State of *Maryland*, do hereby certify that there is deposited in and belonging to the office aforesaid, a certain record book, entitled, "Record of the Officers and Soldiers entitled to land westward of *Fort Cumberland*, in *Washington* county, with the numbers of the lots drawn for them, agreeably to an act of the General Assembly, passed November session 1788."

Received into the land office the 14th November 1789, by *John Callahan*, Reg. L. O. W. S.

And that the said record book, in a certain part thereof, under the caption of "Soldiers entitled to land westward of *Fort Cumberland*," contains among others, the following entries, to wit, viz:

<i>Names.</i>	<i>Rank and Regiment.</i>	<i>No.</i>
<i>John Kidd.</i>	P.            4.	1225.

And I do hereby further certify, that another record book, deposited in and belonging to the office aforesaid, entitled, *Ledger A*, and received into the said land office, according to the following receipt upon the first page thereof, to wit:

Received into the land office as a record, agreeably to the directions of an Act of Assembly, to dispose of the reserved lands westward of *Fort Cumberland*, in *Washington* county, &c., passed November session 1788.

Test,                      JNO. CALLAHAN, Reg. L. O. W. S.



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Lee vs. Hoyo.—1843.

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And in a certain part thereof, contains as follows, to wit:

*December 10th, 1787.* In compliance with a resolution of the General Assembly of the State of *Maryland*, of the 20th May 1787, and a commission from the governor and council, to me directed, bearing date the 11th June 1787, for the purpose of surveying and laying out the reserve land, to the westward of *Fort Cumberland*, into convenient lots of 50 acres each, &c.

I hereby certify that I have carefully surveyed for the State aforesaid, 4165 lots of 50 acres each, lying and being in *Washington* county and State aforesaid, and on the manors, reserves and confiscated lands, to the westward of *Fort Cumberland*, as will appear by a general plat thereof, and certificates numbered in rotation from 1 to 4165, in this book and another titled *Ledger B.*

Per

FRANCIS DEAKINS.

And also the following entry, to wit:

No. 1225. Beginning at end of the second line of lot 1224, and running north-west ninety-seven perches, south twenty-six degrees, west one hundred and twenty-two perches, to the end of the second line of lot 1222, and with it reversed, south seventy-eight degrees, east sixty-eight perches, then by a straight line to the beginning, containing fifty acres.

And I do further certify that the foregoing entries have been severally compared and collated with the said original record book, from which they have been respectively taken, and that they agree and correspond therewith.

In testimony whereof, I have hereunto set my hand and affixed (Seal.) my official seal, this 6th day of October, 1841.

GEORGE G. BREWER, Reg. L. O. W. S., Md.

Similar certificates were offered in evidence for lots

No 1226 granted to *Timothy Langrel*,

“ 1229 “ to *John King*,

“ 1230 “ to *William King*,

“ 1231 “ to *George Elms*,

“ 1235 “ to *James Driver*.

For the purpose of shewing title in the respective persons, named in said papers to the respective lots of land claimed in this action, at the time said papers or entries were made, to

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the sufficiency of which said extracts from said books of the land office, for such purpose, the defendant by his counsel objected, on the ground, that the said extracts did not furnish sufficient evidence to shew that the said lots of land had been allotted to the respective persons therein named, by the commissioners, under and in conformity to the provisions and requirements of the act of Assembly of 1788, chapter 44, so as to vest the legal title to said lots in said persons respectively, but the court (BUCHANAN, C. J. and BUCHANAN, A. J.,) was of opinion, and so instructed the jury, that the said extracts were legally sufficient for the said purpose for which they were offered, to which opinion and instruction the defendant excepted.

2ND EXCEPTION. The plaintiff then to support the issue on his part joined, offered in evidence the following patent :

“THE STATE OF MARYLAND, *To all persons to whom these presents shall come, greeting :* Know ye,

T. W. VEAZEY, that whereas, *John Hoyer* of *Allegany* county, on the 28th day of September, 1837, obtained out of the *Western Shore Land Office*, a special warrant of es-

(Seal.)

T. BLAND, Ch. cheat, to re-survey and affect the following lots, lying in the county aforesaid, and contiguous to each other, viz: Nos. 1226, 1232, 1235, 1234, 1229, 1230, 1231, 1517, 2569, 2567, 2536, 2535, 2538, 2526 and 2527, with liberty of correcting errors, adding any contiguous vacancy, and of reducing the whole into one entire tract, and he, the said *John Hoyer*, assigned the said warrant of escheat to *James Smith*, of the county aforesaid. In pursuance whereof, a re-survey was made on only the following lots, viz: Nos. 1226, 1232, 1235, 1229, 1230 and 1231, and a certificate thereof returned, when the same were found to contain with fifty-five and a half acres of vacant land, added the quantity of three hundred and fifty-four and a half acres, and called “*Flavia*,” and he having since by his assignment, bearing date the 28th day of February 1838, assigned, transferred and made over the same unto *John Hoyer*, who fully

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compounded for said land according to law. The State of *Maryland* doth therefore, hereby grant unto him, the said *John Hoyo*, the said lots re-surveyed as aforesaid, with the vacancy added, reduced into one entire tract and called "*Flavia*," lying in *Allegany* county aforesaid. Beginning for the outlines of the whole, at the end of the third line of lot No. 1225, it being also at the end of the second line of lot No. 1223, and running thence reversing the third line of lot No. 1225, and running with the second line of lot No. 1222, north seventy-eight degrees west, sixty-eight perches, to the second line of lot No. 2517, and reversing it and running with the second line of lot No. 2516, and reversing the second line of lot No. 1225, north twenty-six degrees east, one hundred and twenty-four perches, to the beginning of lot No. 1232, and reversing the given line thereof, south eighty degrees west, twenty-three perches, then reversing the third line of lot No. 1232, and running with the second line of lot No. 2518, and the second line of lot 2515, north twenty-six degrees east, one hundred and twenty perches, then reversing part of the second line of lot No. 1232, north sixty-six degrees east, one hundred and forty-three perches, then north twenty-three degrees east, ninety-three perches, to the second line of lot No. 1235, and running with the lines thereof, north sixty-seven degrees west, ninety perches, north twenty-six degrees east, eighty-five perches, south sixty-seven degrees east, ninety-five perches, then running with the first line of each of lots No. 1235 and 1226, south twenty-three degrees west, one hundred and seventy perches, to the end of the second line of lot No. 1230, and reversing said line, and running with the second line of lot No. 1231, south forty-five degrees east, two hundred perches, then running with the third line and with the given line of lot No. 1231, south forty-five degrees west, eighty perches, north forty-five degrees west, one hundred perches, to the end of the first line of lot No. 1229, then by a straight line to the beginning, containing three hundred and fifty-four acres and one half of an acre, according to the certificate of re-survey thereof taken and returned into the *Western Shore*



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*Land Office*, bearing date the fifth day of January 1838, and there remaining, together with all rights, profits, benefits and privileges thereunto belonging. To have and to hold the same unto him, the said *John Hoyer*, his heirs and assigns forever. Given under the great seal of the State of *Maryland*, this 7th day of September 1838. Witness the Honorable THEODORICK BLAND, esquire, Chancellor.”

And then rested his case, relying upon the same as legally sufficient, in connexion with the testimony offered in the first bill of exceptions, which is to be taken and considered as forming a part of this second bill of exceptions, to vest the legal title of the land, for which this suit is brought, in him, and to entitle him to recover the same in this suit, to the sufficiency of which said patent for the said purpose, the defendant objected, and prayed the court to instruct the jury, that the said patent was insufficient for the purpose for which it was so offered, on the ground, that it does not appear on the face of the patent whose lands were escheated; or any of the facts or circumstances, set forth to shew, that said lands so granted, were liable to escheat; which instruction the court (BUCHANAN, C. J. and BUCHANAN, A. J.) refused to give, being of opinion, that the said patent so offered, was legally sufficient to vest the plaintiff, with title in fee in the lands it purports to convey, and that therefore, the plaintiff is entitled to recover; to which refusal and opinion of the court, the defendant excepted.

3RD EXCEPTION. The defendant then to support the issue on his part joined, offered in evidence the following patents:

“THE STATE OF MARYLAND, *To all persons to whom these presents shall come, greeting:* Know ye,

BEN. OGLE. that whereas, General *John Swan* of the *City of Baltimore*, on the 17th of Octo-

A. C. HANSON, Ch. ber 1798, obtained out of the *Western Shore Land Office*, a special warrant to

re-survey the following lands, lying in *Allegany* county, and contiguous to each other, viz: *Rich Glades*, originally, on the

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9th of March 1798, granted him for one hundred and fifty acres, and lots No. 1233 and 1236, each containing fifty acres, with liberty of correcting errors, adding vacancy, and reducing the whole into one entire tract. In pursuance whereof, a re-survey was made, when the same were found to contain the exact quantity of two hundred and fifty acres, and there being no vacant land added. The State of *Maryland* doth therefore hereby grant and confirm unto him, the said General *John Swan*, the said lands re-surveyed as aforesaid, reduced into one entire tract, and called *Good Meadows*, lying in *Allegany* county aforesaid, beginning at a bounded white oak, numbered 2511, standing at the end of six hundred and twenty perches, on the first line of a tract of land called the *Royal Charlotte*, it being the beginning of lot No. 2511, and running with the given line of said lot reversed, south eighty degrees east, one hundred and eighty-five perches, to the end of the third line of said lot, then north twenty-six degrees east, seventy perches, to the end of the second line of lot No. 1235, and with it reversed, south sixty-seven degrees east, one hundred perches, to a pile of stones at the end of thirty-four perches on the third line of lot No. 1517, and with it reversed, south twenty-three degrees west, eighty-two perches, south fifty-nine degrees east, eleven perches, to a bounded red oak bush, south sixty-two degrees west, one hundred and fifty-six perches, to the end of the second line of lot No. 2515, and with it, north eighty degrees west, two hundred and eight perches, to a bounded black oak and white oak, the beginning of lot No. 2509, then by a straight line to the beginning, containing two hundred and fifty acres, according to the certificate of re-survey thereof taken and returned to the land office, bearing date the 27th of May 1799, and there remaining, together with all rights, profits, benefits and privileges thereunto belonging. To have and to hold the same unto him, the said General *John Swan*, his heirs and assigns forever. Given under the great seal of the State of *Maryland*, this 30th day of December 1800. Witness the Honorable ALEXANDER CONTEE HANSON, esquire, Chancellor."

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"THE STATE OF MARYLAND, *To all persons to whom these presents shall come greeting: Know ye,*

BEN. OGLE. that whereas, General *John Swan*, of the city of *Baltimore*, on the 7th of Novem-

A. C. HANSON, Ch. ber 1799, obtained out of the *Western Shore Land Office*, a special warrant of

proclamation of re-survey, and to affect lots No. 1227, 1228 and 1224, lying to the westward of *Fort Cumberland*, in *Alleghany* county, and contiguous to each other, which lots were originally allotted to *Solethiel Gaff*, as settler on and entitled to a preference in the purchase of the same, who neglected paying the purchase money for the same, within the time limited by law. In pursuance whereof, a re-survey was made, when they were found to contain the quantity of one hundred and fifty acres, for which the said *John Swan*, paid to the Treasurer of the *Western Shore*, the sum of thirty-three pounds fifteen shillings, being the full caution money due according to law. The State of *Maryland* doth therefore hereby grant unto him, the said General *John Swan*, the said lots re-surveyed as aforesaid, reduced into one entire tract, and called *Gaff's Neglect*, lying in *Alleghany* county aforesaid, beginning at a bounded white oak marked 2526, standing at the end of six hundred and forty perches on the north-east line from the bounded forked white oak, and running thence, south forty-five degrees west, two hundred and twenty-four perches, to the end of the second line of lot 1223, north forty-five degrees west, one hundred perches, north forty-five degrees east, two hundred and forty perches, to the beginning of lot No. 1231, and with the given line reversed, south forty-five degrees east, one hundred perches, then by a straight line to the beginning, containing one hundred and fifty acres, according to the certificate of re-survey thereof, taken and returned into the land office, bearing date the 28th of January 1800, and there remaining, together with all rights, profits, benefits and privileges thereunto belonging. To have and to hold the same unto him, the said General *John Swan*, his heirs and assigns forever. Given under the great seal of the State of *Maryland*,



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this 16th day of April 1801. Witness the Honorable ALEXANDER CONTEE HANSON, esquire, Chancellor.”

“THE STATE OF MARYLAND, *To all persons to whom these presents shall come greeting* : Know ye,  
ROBT. BOWIE. that whereas, General *John Swan*, of the city of *Baltimore*, on the 3rd of March  
A. C. HANSON, Ch. 1803, obtained out of the *Western Shore Land Office*, a special warrant, to re-survey the following lands lying in *Allegany* county, and contiguous to each other, viz : *Good Meadows*, originally on 13th of December 1800, granted him for two hundred and fifty acres, *Gaff’s Neglect*, originally on the 16th of April, 1801, granted him for one hundred and fifty acres, and lots No. 1225, 1226, 1229, 1230, 1231, 1232, 1234 and 1235, each containing fifty acres, with liberty of correcting errors, adding contiguous vacancy, and reducing the whole into one entire tract. In pursuance whereof, a re-survey was made, when the same were found to contain eight hundred and thirteen acres and one quarter of an acre, and there being no vacant land added. The State of *Maryland* doth therefore hereby grant and confirm unto him, the said General *John Swan*, the said lands re-surveyed as aforesaid, reduced into one entire tract, and called *South Bar*, lying in *Allegany* county aforesaid, beginning at a bounded white oak, numbered 2511, standing at the end of six hundred and twenty perches, on the first line of a tract of land called the *Royal Charlotte*, it being the beginning tree of *Good Meadows*, one of the originals of this re-survey, also the beginning of lot No. 2513, and running thence with the given line of said lot reversed, south eighty degrees east, one hundred and eighty-five perches, then with the third line of lots No. 2513, 2514, 2519 and 4150 reversed, north twenty-six degrees east, two hundred and forty-three perches, to the beginning of the sixth line of lot No. 2572, and with it south sixty-seven degrees east, ninety-three perches, to a bounded white oak marked 2532, it being the beginning tree of lot No. 1234, one of the originals, and the end of the third line of lot No. 1514, then with the said third line and the third lines of

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lots No. 1516, 1517 and 1521 reversed, south twenty-three degrees west, two hundred and fifty-five perches south, fifty-nine degrees east, eleven perches, to the end of the first line of lot No. 1520, and with it reversed, south forty-five degrees east, two hundred perches, to a tract of land called *Chance*, then with *Chance*, south forty-five degrees west, three hundred and twenty perches, to the beginning of the second line of No. 1223, and with it, north forty-five degrees west, one hundred perches, to the beginning of the second line of lot No. 1222, and with it, north seventy-eight degrees west, sixty-eight perches, to the second line of lot No. 2517, then with said line reversed, and with the second line of No. 2516, north twenty-six degrees east, one hundred and twenty-two perches, north forty-five degrees west, three perches, south eighty-eight degrees west, twenty-six perches, to lots No. 2508, then with it, and lot No. 2515, north twenty-six degrees east, one hundred and twelve perches, to the end of the second line of said lot, still with it and lot No. 2509, north eighty degrees west, two hundred perches, to the first line of the *Royal Charlotte*, and thence by a straight line to the beginning, containing and laid out for eight hundred and thirteen acres and one quarter of an acre, according to the certificate of re-survey thereof, taken and returned into the land office, bearing date the 10th of May 1803, and there remaining, together with all rights, profits, benefits and privileges thereunto belonging. To have and to hold the same, unto him the said General *John Swan*, his heirs and assigns forever. Given under the great seal of the State of *Maryland*, this 2nd day of March 1805. Witness the Honorable ALEXANDER CONTEE HANSON, esquire, Chancellor.

Also the plats and explanations which accompany this bill of exceptions, and which are to form a part thereof. He also proved by *George W. Devicmon*, that from thirty-two to thirty-four years ago, he resided in the immediate neighborhood of the lands claimed by the plaintiff in this suit, and continued to live there during a period of twenty years, and that during all that time he never heard of *John Kid*, *Timothy Langrel*, *John King*, *William King*, *George Elms*, *Samuel Denny* and *James Driver*,

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or either of them, being in that part of the country, or making any claim whatever to said lands. The defendant further proved by *William Ashby*, a competent witness, that he was born in the neighborhood of said lands, and is now fifty-six years old, that he, during all that time, never heard of the existence of the above named persons, or any one of them, and never heard of their being in the neighborhood of said lands, or enquiring after or making claim to the same, up to this time. The defendant also proved by *John Waltz*, a competent witness, that he moved to the immediate neighborhood of the land claimed by the defendant in this action, and adjoining the same as far back as the year 1797, and has continued to live there ever since, and up to this time; that he saw the several lots of land contained in the tract of land called *South Bar*, run out in the year 1798, and that the said land has been claimed by said *Swan*, and those claiming under him, down from 1803, to the present time; that the possession or improvement numbered No. 1 on the plats, was made by *George R. Waltz*, about seventeen years ago, and the possession or improvement No. 2, as shown on the plats, was made about ten or twelve years ago, and that the same were made under the defendant, and as his acts; and further, that during the whole time from the year 1803, down to the present time, he never heard of any person claiming said lots of land, or any of them, except the said General *John Swan* and the defendant, and that at the time of the institution of this suit, and for several years before, *Dudley Lee* the defendant, was in possession of said lots as the tenant of *James Swan*. It was admitted by the plaintiff, that the land in controversy has been demised to the defendant and his heirs, by the last will and testament of the said General *John Swan*, deceased, his father, made on the 27th of May 1820.

Whereupon the defendant by his counsel, prayed the court to instruct the jury, that they might presume the death of the respective parties hereinbefore named, as the holders and owners of said lots, without heirs at the time the said lots of land were granted to the said *John Swan*, by the State of *Maryland* as aforesaid, and that the State of *Maryland* therefore,



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at the time the patent was issued to the said General *John Swan*, for the said lots of land, or a part of the tract of land called *South Bar*, had a right to grant the same, they then being liable to escheat, and that the title in fee of said lots, did pass by the said patent for *South Bar*, from the State of *Maryland* to the said General *John Swan*, and that therefore the plaintiff is not entitled to recover in this case upon the title so adduced, and relied upon by him as aforesaid; which prayer and instructions the court (BUCHANAN, C. J. and BUCHANAN, A. J.,) refused, being of opinion, that the said patent for *South Bar*, passed no title whatever to the said *John Swan*, for said lots so embraced in the same. To which refusal and opinion, the defendant excepted.

4TH EXCEPTION. The defendant then further to support the issue on his part joined, in addition to the evidence offered in the third bill of exceptions, which is to be taken and considered as forming a part of this fourth bill of exceptions, proved by competent testimony, that General *John Swan* was taxed with the said tract of land called *South Bar*, including said lots, from the year 1805, to the time of his death, and paid the taxes on the same, and that since his death down to the present time, the said land in controversy has been taxed to the defendant, who had paid the taxes on the same.

Whereupon the defendant by his counsel, prayed the court to instruct the jury, that they may and ought to presume, that deeds of conveyance were duly made, executed and acknowledged, conveying to the said *John Swan*, in his life time in fee, the said lots of land so owned by the soldiers, the respective said original owners thereof, which instruction the court refused to give; to which opinion and refusal of the court, the defendant excepted.

The verdict and judgment being against the defendant, he prosecuted the present appeal.

The cause was argued before STEPHEN, ARCHER, DORSEY and SPENCE, J.

By ALEXANDER and SCHLEY for the appellants, and

By PRICE for the appellee.

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STEPHEN, J. delivered the opinion of this court.

During the trial of this case, several exceptions were taken to the opinions of the court below, upon which it becomes the duty of this court now to decide. The plaintiff to support the issue on his part joined, offered in evidence certain certificates and extracts from the books of the land office, for the purpose of shewing title, in the respective persons named in said papers, to the respective lots of land, to recover which this action was instituted, at the time said papers and entries were made; to the sufficiency of which extracts from the books of the land office for such purpose, the defendant objected, on the ground that said extracts did not furnish sufficient evidence to prove that said lots of land had been allotted to the respective persons therein named by the commissioners, so as to vest the legal title to said lots in said persons respectively; but the court was of opinion and so instructed the jury, that the said extracts were legally sufficient for the purpose for which they were offered; to which opinion and instruction the defendant excepted; and whether in that opinion there was error, it is now necessary to determine.

By the act of 1788, chapter 44, it was made the duty of the commissioners to distribute the lots in controversy among certain officers and soldiers by lot, and to endorse the name of the officer or soldier on the ticket, containing the number drawn by such officer or soldier; and the law provides that thereupon, an estate in fee simple should be vested in the officer or soldier in such lot, without any patent, deed or grant, to be issued for that purpose: a legal estate in fee therefore vested in the officers and soldiers by operation of law, without any further evidence or muniment of title to be furnished by the officers of government for that purpose. The law directing the distribution, also provides that the commissioners shall make a record of all the lots by them distributed among the said officers and soldiers, and return the same to the Register of the Land Office, to be by him safely kept. The said law also recognises the validity of the books, in which are entered the certificates of all the lots distributed as

aforesaid, ascertaining and defining their respective boundaries and locations. From these books and the record returned into the land office by the commissioners, the certificates and extracts offered in evidence were taken and certified by the register of the land office; and we are of opinion that they were good and sufficient evidence for the purpose for which were offered. So far as the question of title was involved, they were by law invested with all the legal properties and attributes of a patent, and were therefore competent and admissible evidence; the certificates of the register embracing every thing which the records of his office can furnish in relation to the title and ownership of such lots.

The plaintiff then in addition to the preceding evidence, offered in evidence an escheat patent for the land for which the ejectment was brought, and there rested his case, relying upon the same as legally sufficient, together with the evidence in the first bill of exceptions to vest the legal title of the land, for which the suit was brought, in him, and to entitle him to recover; but the defendant objected to the sufficiency of the patent for that purpose, on the ground that it did not appear on the face of the patent whose lands were escheated, nor were any of the facts or circumstances set forth to shew that said lands were liable to escheat; but the court overruled the objection, and were of opinion that the patent was legally sufficient to vest the title in fee in the plaintiff in the lands it purported to convey, and that therefore the plaintiff was entitled to recover.

In this opinion of the court there was no error, so far as the same was objected to by the defendant. In 2 *H. & J. Rep.* 126, the principle is stated to be, that an escheat grant is *prima facie* evidence of title, and is available for that purpose until the contrary is proved. It is not necessary or usual according to the practice of the land office, to state on the face of the patent whose lands were escheated, or the facts or circumstances which shew the lands were escheatable. Where a warrant regularly issued, has been executed by the proper officer, and a certificate returned, which has laid a sufficient



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time in the land office without caveat, to justify the emanation of a grant, it is but a fair, reasonable, *prima facie* presumption, that the land taken up was escheatable, and that the title passed to the grantee. But the court erred in that part of their opinion, in which they declared that the plaintiff was entitled to recover all the land covered by the patent, as well that part which was escheated, as that which had been taken up as vacancy. It appears by the proof in the case offered by the plaintiff himself, that lot numbered 1225, had been allotted to a certain *John Kidd*, which was taken up and included in his patent, as vacancy.

We think there was no error in the opinion of the court in the third bill of exceptions. The lots were distributed to the soldiers in 1789, in virtue of the act of Assembly passed for that purpose, and *South Bar* was patented on the 2nd March 1805, a period of time too short to warrant a presumption of the death of the holders of such lots, without heirs, under the circumstances of the case; there being no proof moreover that the soldiers ever resided on the lots, or in the neighborhood where they were situated, or any evidence offered of any facts or circumstances on which such a presumption could be properly founded. But such a presumption at all events, ought not to be made in support of a title, acquired in violation of law and the rules of the land office, which require two-thirds of the value to be paid to the State, before a title can be obtained in lands liable to escheat, and which also require that a warrant of resurvey should be founded upon a seisin in fee, in the lands upon which the resurvey is to be made; neither of which essential conditions appear to have been complied with in the case of the patent for *South Bar*.

We think there was no error in the opinion of the court in the fourth bill of exceptions. The possession of the defendant of the lots in controversy was only a partial one, and that for so short a period as ten or fifteen years, with a general claim of title, was too short a period to warrant the presumption of a conveyance of the lots to the patentee of *South Bar*, as prayed for by the defendant. For the reasons above stated,

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the judgment of the court below is reversed and a procedendo ordered.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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GUSTAVUS BEALL vs. JAMES BLACK.—*December 1843.*

Under the act of 1835, ch. 201, the county court has jurisdiction in an action on the case, for overflowing the plaintiff's land, by reason of obstructions suffered to remain in defendants' mill-race, where the damages laid were above one hundred dollars, though the verdict was for a less sum.

In cases of contract the sum recovered, and not the matter put in demand, is made to decide the question of jurisdiction. The language is where the debt or damages do not exceed one hundred dollars.

It is the duty of courts of justice by just construction, to reconcile the various sections in an act of Assembly, to prevent that clashing interference and incongruity which ought never to be imputed to the legislature, where it is practicable to avoid it.

APPEAL from *Allegany* County Court.

This was an action upon the case, brought by the appellee against the appellant, on the 15th April 1840.

The plaintiff declared, that whereas the said plaintiff on, &c., and long before was, and from thence hitherto hath been, and still is lawfully seized and possessed of a certain close, consisting of lots Nos. 218 and 219, situated on *Mechanic* street in the town of *Cumberland*, and a parcel of land being part of the tract called "*Walnut Bottom*," situated on *Mill* street in said town, through which said close a certain canal, commonly called a "mill race," for a long time hitherto hath existed and still exists, in and through which, until the committing of the grievances hereinafter mentioned, the water has been used to run and flow in sufficient and abundant quantity, to supply a certain mill of the said defendant, situated below the close aforesaid, of the said plaintiff, without overflowing in any manner the banks of said canal, or doing the least injury to the close aforesaid, to wit, at the county aforesaid. And whereas, in consideration of the use and enjoyment of the said canal,

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by the said defendant, for the purpose of conveying by means of the same, the water out of *Wills* creek, down and through the said plaintiff's close to the mill of the said defendant, for the use thereof, it was the legal and bounden duty of the said defendant, to have kept the said canal at all times hitherto, free from obstructions of any kind, and to have kept the bed of the same constantly cleaned out, and prevented it from filling up by any sort of wash or alluvial matter, &c., to wit, at the county aforesaid. Yet the said defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure and prejudice the said plaintiff in respect of his said close, by making the same valueless and untenable heretofore, to wit, on the day and year first above mentioned, and on divers other days and times before and since obstructed the water in said canal, and caused the same to back up, until it reached and overflowed the said plaintiff's close, and covered the same with a constant pool of water, by raising and heightening the dam at his, the defendant's mill aforesaid, above its usual, lawful and customary height, and altering the bed of the same, and also by contracting the dimensions of said canal, at and near said dam, and suffering the wash and all sorts of alluvial matter to accumulate in the bed of said canal, along the whole line of the same, from its junction with *Wills* creek unto the terminus thereof, at the said defendant's mill aforesaid, to wit, at the county aforesaid. By means whereof, the close aforesaid, of the said plaintiff was and has been, and still is greatly impaired in value, and ever since the committing of the grievances aforesaid, has become entirely useless, unfit for cultivation and uninhabitable, to wit, at, &c.

The declaration contained several other counts, varying the nature of the injury complained of, and concluded, whereby the said plaintiff saith that he hath damage, and is the worse to the value of one thousand dollars, and thereupon he brings suit, &c. The defendant pleaded *not guilty*, on which issue was found, and a verdict was rendered against him for *seventy-five* dollars.



*Motion in arrest of judgment.* For that at the time of issuing the original writ in this cause, the act of the General Assembly of Maryland of 1835, chapter 201, entitled an act to establish magistrates' courts in the several counties of this state, and to prescribe their jurisdiction, was in force in *Alleghany* county, and the cause of action was therefore not within the jurisdiction of this court, the verdict of the jury in this cause being for a sum less than one hundred dollars, by the defendants deducting the amount of such damages found by the jury from his costs.

The county court overruled the motion in arrest, and the defendant, after judgment against him, prosecuted this appeal.

The cause was argued before STEPHEN, ARCHER, DORSEY and CHAMBERS, J.

By MCKAIG for the appellant, and

By McMAHON and PRICE for the appellee.

STEPHEN, J., delivered the opinion of this court.

This is an action of trespass on the case, instituted in *Alleghany* county court, for an alleged injury to the plaintiff by overflowing his land, and the damages laid in the nar to amount to the sum of one thousand dollars. The suit was brought after the passage of the act of 1835, chapter 201, establishing magistrates courts in the several counties of this State, and prescribing the limits of their jurisdiction. The jury rendered a verdict for the sum of *seventy five* dollars, as the amount of damage sustained by the plaintiff, and the defendant by his counsel moved in arrest of judgment, upon the ground of a defect of jurisdiction in the county court, and that the cause of action was exclusively cognisable by the magistrates courts, as their jurisdiction was limited and defined by the provisions of the said act of Assembly. The motion of the defendant was overruled by the court below, and the jurisdiction of the county court sustained by entering judgment for the plaintiff, upon the verdict for the damages found by the jury, and his costs of suit.

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Beall vs. Black.—1843.

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A question of a similar nature has very recently engaged the attention of this court, which rendered it necessary to examine the several acts of Assembly, defining the powers of justices of the peace in the recovery of small debts, and other matters submitted by law to their jurisdiction. According to the opinion then entertained by this court, in reference to the proper test of jurisdiction to be applied to this case, the jurisdiction of the court below was not ousted or taken away by the act of 1835, ch. 201, and judgment in favor of the plaintiff for his damages and costs was properly entered by them.

The act of 1835, ch. 201, sec. 2, provides that the district courts "shall have jurisdiction over, and may take cognizance of all cases whatever, now within the jurisdiction or cognizance of a single or two justices of the peace, and in all like or similar cases, where the debt or damages laid or claimed, shall not exceed the sum of one hundred dollars, and under like and similar restrictions and limitations, except so far as the same may be inconsistent with the provisions of this act; and shall have and exercise original jurisdiction in all cases of debt or contract, expressed or implied, where the debt or damages do not exceed one hundred dollars," and in all actions of trespass, where the title is not involved, and the damages claimed do not exceed one hundred dollars.

Prior to the act of 1835, the jurisdiction of the county court to administer redress to the plaintiff for the injury done to his property was clear and unquestionable, and we do not think that upon a proper and true construction of that act, according to the principles settled by this court, in the case of *O'Reilly vs. Murdoch*, above referred to, it has been taken away or ousted.

In that case it was held, that in actions similar to the present, the true standard of jurisdiction was furnished not by the sum recovered by the verdict of the jury, but by the sum put in demand, or the damages laid or claimed in the plaintiff's declaration. By an act passed in 1824, a new test of jurisdiction was first introduced in cases sounding in tort, and not in contract, and from that period, the same rule has been preserv-

ed inviolate. The rule established by that act, (and which has uniformly been adhered to ever since,) to test the jurisdiction of the justices of the peace in cases of tort, has been the damages claimed, and not the sum recovered. In cases of contract, a different principle seems to have prevailed; and in all such cases, the sum recovered, and not the matter put in demand is made to decide the question of jurisdiction. From this rule no departure has been made by the act of 1835. In all cases of debt or contract, expressed or implied, it is the real debt or damage which founds the jurisdiction. The language is, shall have and exercise original jurisdiction, "where the debt or damages do not exceed one hundred dollars," but when that act confers jurisdiction in trespass or other cases of tort, it is the sum demanded which furnishes the criterion of judicial power, and not the sum recovered. Nor is there any thing in the fourth section of the said act, which upon a proper construction of it, can be considered as impugning the views heretofore taken of this subject. The cases referred to in that section, where the jurisdiction of the county court is made to depend upon the verdict of the jury, are manifestly cases of debt or contract, previously provided for in that act, and where the same test had been adopted, and not cases of tort, where a different rule had been applied, as establishing the boundaries of jurisdiction. This construction is necessary to reconcile the second and fourth sections, and to prevent that clashing interference and incongruity, which ought never to be imputed to the legislature, where it is practicable to avoid it.

JUDGMENT AFFIRMED.



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Bowie vs. Jones.—1843.

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FIELDER BOWIE vs. RICHARD JONES USE OF EDWARD M. LINTHICUM.—*December 1843.*

A release under the insolvent laws pleaded and relied upon as a defence in bar of the action, and upon an issue joined on a denial of the truth of the plea, when offered in evidence, is said to come incidentally in question.

The jurisdiction of the county courts in relation to insolvent debtors is limited, but in support of a release under the acts relating to them; all that is necessary to be shown, is that the case made by the record of the release is within the limited jurisdiction, and then the judgment would be just as obligatory and conclusive as if the judgment were one of a court of general jurisdiction.

The release of an insolvent debtor is an exception to the principle, that where the course of procedure is pointed out by statute, the proceedings must show their conformity with the act by which they are authorized.

Under the act of 1805, ch. 110, the presentation of a petition by a party in confinement was alone necessary to give jurisdiction, and since the proof of confinement has been dispensed with by the act of 1830, ch. 130, the jurisdiction of the county court attaches by the presentation of a petition such as is prescribed by the acts in relation to insolvent debtors.

A single judge is empowered to act upon the petition of an insolvent debtor, in the recess of the county court, and hence the application for relief made in conformity to the statutes is depending in point of law, from the time of its presentation to the judge, though not filed with the clerk of the court.

Either the county court, or a judge thereof in the recess of the court, may grant a personal discharge, appoint a trustee, and take a bond.

Where the release of an insolvent debtor comes incidentally in question, it cannot be avoided upon the ground, that the insolvent had a prior application depending at the time of the one under which he obtained his final discharge.

Where the jurisdiction of a court once attaches, and the court proceeds to final judgment, the same judgment, coming incidentally in question, is to be respected.

Where the county court maintained the invalidity of an insolvent debtor's release relied upon in bar of the plaintiff's action, and the jury found accordingly, and also, that the insolvent since his release had obtained goods, &c., by descent, &c., in his own right; this court disagreeing with the county court and holding the release valid, will award a procedendo to try the question of subsequent acquisition by the debtor within the exceptions of the act of 1805, ch. 110.

APPEAL from *Prince George's* County Court.

This was a *Scire Facias*, sued out on the 28th August 1835, to revive a judgment of *Prince George's* county court, render-

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ed at October term 1826, in favor of *Richard Jones* against the appellant.

The defendant appeared, and it was “agreed that the plea of the defendant’s discharge under the insolvent laws of this State may be put in short, and be taken and received as if it had been written out at length and filed, the fact of said discharge and the legality and regularity of its obtention being however not admitted by the plaintiff, but to be subject to all legal exceptions. *November 24th 1836.*”

PLEA, &c. And that the said plaintiff ought not to have his execution against him, &c., except such property as he the said defendant shall hereafter acquire by gift, descent, or in his own right by bequest, devise or in course of distribution, because he the said defendant saith that after the rendition of the judgment in the said writ of *scire facias* mentioned and set forth, to wit, on the 12th of October 1831, he the said defendant obtained from the honorable the judges of *Prince George’s* county court, a final discharge under and in virtue of the insolvent laws of the *State of Maryland*, of and from the payment of debts, &c.; and he the said defendant further saith, that he hath not acquired any goods or chattels, lands or tenements since the rendition of the judgment aforesaid, by descent, gift or in his own right by bequest, devise or in course of distribution, whereof the said plaintiff can have execution of the judgment in the said writ of *scire facias* aforesaid mentioned, and this he the said defendant is ready to verify, &c.

Replication by plaintiff, that to be precluded he ought not, because he saith, that the several matters and things contained in the said plea of the said defendant, as before stated, are not true, and of this he puts himself upon the country; and the said defendant doth the like, &c.

At the trial of this cause, the defendant offered in evidence to the jury, to support the plea of his discharge under the insolvent laws, and under the agreement in the cause, which is as follows: “It is agreed in this cause, that the plea of the defendant’s discharge under the insolvent laws of this State, may be put in short, and be taken and received, as if it had

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been written out at length and filed. The fact of said discharge, and the legality and regularity of its obtention being however not admitted by the plaintiff, but to be subject to all legal exceptions. *November 24th, 1836."*

And also the record of his petition for the benefit of the insolvent laws, and his final discharge thereunder, at April term 1831, and filed on the 15th of April 1831, which is as follows:

*Fielder Bowie petitioner for the benefit of the insolvent laws.* Be it remembered, that heretofore, to wit, on the 15th day of April 1831, the said *Fielder Bowie* filed in *Prince George's* county court here, the following proceedings, had before the honorable *John R. Plater*, one of the associate judges of *Prince George's* county court as aforesaid, in and upon his the said *Fielder Bowie's* petition for the benefit of the several acts of Assembly of *Maryland*, for the relief of insolvent debtors, in the words and of the tenor following, to wit:

*To the Honorable the Judges of Prince George's County Court:* The petition of *Fielder Bowie*, of said county, respectfully represents, that he is now in actual confinement for debts, which he is at present unable to pay, and is therefore driven to the necessity of praying your honors to extend to him the benefit of the several acts of Assembly relating to insolvent debtors. He exhibits to your honors a schedule of his property, real, personal and mixed, (the necessary wearing apparel and bedding of himself and family excepted,) and a list of creditors and debtors, so far as he has been enabled to ascertain the same with the amounts due to and from each, all of which are upon oath, and all of which estate, this petitioner is ready and willing to deliver up, for the benefit of his creditors. *April 13th 1831.* *FIELDER BOWIE.*

A schedule of the property of *Fielder Bowie*, real, personal and mixed, the necessary wearing apparel and bedding of himself and family excepted. Real none, personal none, mixed none.

List of the creditors of *Fielder Bowie*, the within petitioner, with the amounts respectively due them, so far as he can at present ascertain the same, &c.



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List of debtors of *Fielder Bowie*, with the amounts due as far as he can at present ascertain the same—none.

MARYLAND, *Prince George's County, Sct.* On this 13th day of April 1831, personally appears *Fielder Bowie*, the within petitioner before the subscriber, and makes oath on the Holy Evangely of Almighty God, that the within and aforegoing schedule and list of creditors and debtors are true, as far as he can at present ascertain, to the best of his knowledge and belief.

Sworn before

J. R. PLATER,

*One of the Associate Judges of the First Judicial District.*

*Prince George's County, Sct.* We hereby certify, that *Fielder Bowie*, the within named petitioner, is a citizen of the State of *Maryland*, and hath resided therein the two years last past.

THOMAS BRUCE,

E. M. DORSEY.

The bond for the debtors appearance at October term of *Prince George's county court*, was also dated 13th April 1831, as also his trustee's bond.

*Prince George's County Court, April Term 1841.* Ordered by the court, that *Philemon Chew* be and he is hereby appointed trustee for the benefit of the creditors of *Fielder Bowie*, the within named petitioner.

J. R. PLATER.

*April 13th, 1831.*

The insolvent's deed to his trustee was dated 13th April, 1831, and acknowledged on the same day before the judge who granted the discharge.

*Prince George's County, Sct:* I do hereby certify that I am in possession of all the property, real, personal and mixed, of *Fielder Bowie*, mentioned in his schedule, accompanying his application for the benefit of the insolvent laws of this State.

PHIL. CHEW.

Whereupon the court passed the following order:

*Mr. Beall*,—File this petition and papers, enter the personal discharge of the petitioner, and the usual order of publication of notice to the creditors.

J. R. PLATER.

*April 13th, 1831.*

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And it was also ordered by the said court, that the said *Fielder Bowie* make publication of the following order, which is as follows:

*Prince George's County Court, April Term 1831.* Ordered by the court, that the creditors of *Fielder Bowie*, a petitioner for the benefit of the insolvent laws of this State, be and appear before the court at *Upper Marlborough* town, on the second Monday of October next, to file allegations (if any they have,) against said petitioner, provided a copy of this order be published once a week for three successive months, before the said second Monday of October.

Test,                      *AQUILA BEALL, Clk. P. G. C. C.*

On which said second Monday of October, being the tenth day of the same month, in the year of our Lord eighteen hundred and thirty-one, the said *Fielder Bowie*, in pursuance of the condition of this bond aforesaid, executed to the State of *Maryland* for that purpose, and according to the requisitions of the order of publication aforesaid, of the said court, appears in court here, and the said *Fielder Bowie*, the petitioner aforesaid, appears also in court here, on the twelfth day of the same month, in the year aforesaid, and files the following certificate of the editor of the *Maryland Republican* newspaper, of the publication of the foregoing order of the said court, with a copy of said order thereto-annexed, which said certificate is in the following words, to wit:

I hereby certify that the order of *Prince George's* county court, in the case of *Fielder Bowie*, hereto attached, has been inserted in the *Maryland Republican* once a week for three successive months, from the 2nd July 1831.

*JERH. HUGHES.*

Which being read and heard, and due consideration had, it was thereupon ordered and adjudged, that the final oath be administered to the said *Fielder Bowie*, and that he the said *Fielder Bowie* shall be discharged from all debts, covenants, contracts, promises and agreements, due from or owing or contracted by him, provided nevertheless, that any property which he hath acquired since the passage of the said act, or which

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he shall hereafter acquire by gift or descent, or in his own right by bequest, devise, or in course of distribution, shall be liable to the payment of the said debts.

Test,

JNO. B. BROOKE, Clk.

The plaintiff then, under the agreement in reference to the pleadings, to support the issue on his part joined, proved to the jury that the original judgment, to revive which the present *scire facias* is brought, was rendered against the defendant at April term 1826, of *Prince George's* county court, and gave evidence of its amount to the jury.

The plaintiff also offered in evidence to the jury the following record of the defendant's petition for the benefit of the insolvent laws, filed on the 17th day of October 1827, and all the proceedings thereon, which are as follows, &c. This last application was prosecuted until April court 1831, when the said *Fielder Bowie*, the petitioner aforesaid, by his attorney aforesaid, moves the court here that his petition aforesaid, with all things thereunto relating, be dismissed and set aside, and that the said *Fielder Bowie* have no discharge under or benefit of the insolvent laws of the State of *Maryland*, in virtue thereof. Whereupon it is ordered, adjudged and determined that the petition aforesaid, of the said *Fielder Bowie*, with all things thereunto relating, be and the same are hereby dismissed, set aside and held as utterly null and void, and that the said *Fielder Bowie* receive no discharge under or benefit of the several insolvent laws of the State of *Maryland*, in virtue thereof.

Test,

JOHN B. BROOKE, Clk.

The plaintiff insisted before the court that the final discharge of said *Fielder Bowie*, under the said petition of the 15th of April 1831, was irregular and void, and was no bar to the execution sought for in the present action, but the defendant by his counsel contended that it was not competent for the plaintiff to take advantage of said objection, as to the irregularity of said discharge in the present action, and prayed the court so to instruct the jury. But the court (STEPHEN, C. J.,) were of opinion, that it was competent for the plaintiff to make said objections, and instructed the jury, that if they find that the



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said defendant obtained his personal discharge, that the trustee was appointed and gave bond, and the insolvent executed his deed to the trustee before the petition was filed, that then the said final discharge was irregular and void, and was no bar to the plaintiff's right in the present action; to which opinion of the court and their instruction to the jury, the defendant excepted.

The jury found by their verdict that the defendant did not obtain his final discharge, &c., and that he had acquired goods, &c., since the rendition of the judgment, by descent, &c., in his own right, upon which the county court ordered a *fiat executio*.

The cause was argued before ARCHER, DORSEY and CHAMBERS, J.

By THOMAS F. BOWIE and J. JOHNSON for the appellant, and  
By T. G. PRATT for the appellee.

ARCHER, J., delivered the opinion of this court.

The court below decided that it was competent for the plaintiff to object to irregularities in the defendant's discharge under the insolvent laws, and they instructed the jury, that if they find that the defendant obtained his personal discharge, that the trustee was appointed and gave bond, and the insolvent executed his deed to the trustee before the petition was filed, that then the said final discharge was irregular and void, and was no bar to the plaintiff's right in the present action.

It is said by this court in 2 *Gill & John*. 50, that the decision of a court of competent jurisdiction, when coming incidentally in question, or offered in evidence of title in any other court, is conclusive of the question decided, and cannot be impeached on the ground of informality in the proceedings, or error, or mistake of the court in the matter on which they have adjudicated, and the court in that case decided that the county court would not determine letters of administration to be void, although granted by the orphans court in a case where the law had conferred no authority on such court to grant letters.

It is supposed that the judgment of the county court does not come incidentally in question here. But in answer to this

we have to say that it is pleaded and relied upon only as a protection against the claim of the plaintiffs. The case of *Taylor and McNeil vs. Phelps*, 1 G. & J. 503, will be found to be an answer to the objection. The only inquiry would therefore seem to be whether the jurisdiction of the county court attached; if it did, whatever irregularities may have been committed, could not be the subject of revision.

It is however supposed that the court in the exercise of its jurisdiction in relation to insolvents, is limited, and that the course of procedure is pointed out by the statutes, that therefore all the requirements of the various acts as preliminary to the final discharge, must appear to have been substantially complied with. It is true the jurisdiction of the court is limited, but in such case all that is necessary to be shewn is, that the case is within the limited jurisdiction, and the judgment would be just as obligatory and conclusive as if the judgment were one of a court of general jurisdiction.

However true may be the principle, that where the course of procedure is pointed out by the statute, the proceedings must show their conformity with the act by which they are authorised; yet, since the decision of the court in 5 H. & J. 189, the judgment of tribunals of this State, discharging insolvents, has been considered an exception to that rule. In the case adverted to the court say, "they do not wish it to be understood that discharges under the insolvent laws are liable to all the objections that are usually relied on against proceedings of persons limited by special authorities."

The same doctrine would appear to prevail in the *English* courts. In *Willis' Rep.* 199, to an action on the case for goods sold and delivered, the defendant pleaded his discharge under the act of 10 Geo. 2, by the general quarter sessions for the city of *Bristol*. To this plea there was a replication that the defendant had not surrendered himself to prison. The defendant demurred generally, and the court say, that if it had appeared that the sessions had a jurisdiction, it would have been sufficient to have said generally, that the sessions had discharged him, and that the court could not enquire into any facts

necessary to be done by him, in order to obtain his discharge, of which the sessions were the only and the proper judges, and must be taken to have adjudged right, and they decide the plea to be defective, because it did not state what was necessary to give the court jurisdiction, to wit, that the defendant surrendered himself to prison. See also the case of *Linwood vs. Hopkins*, referred to by the counsel in the above case, where it being objected that the proper notice was not given in the *Gazette*. Lord Hardwick was of opinion that the sessions were the proper judges of this, and that it could not be enquired into upon the trial. Under the act of 1805, ch. 110, the presentation of a petition by a party in confinement, was alone necessary to give jurisdiction, and since the proof of confinement has been dispensed with by the act of 1830, ch. 130, the jurisdiction of the county court attaches, by the presentation of a petition, such as is prescribed by the acts in relation to insolvent debtors. This view of the subject renders the examination of the various objections which have been urged against the regularity of the proceedings in this case, unnecessary.

Two objections however have been taken by the counsel for the appellee, one of which has been sustained by the court below, which it may be proper for this court to advert to, as they refer rather to the time and circumstances of the application, than to the proceedings themselves.

1. It is alleged that the proceedings are void, if the defendant obtained his personal discharge; the trustee was appointed and gave bond, and the insolvent executed his deed to the trustee before the petition was filed, and so the court decided below.

The proceedings all bear date the 13th of April, and they are filed on the 15th of same month. That the court, or a judge, possessed power to grant a personal discharge and to appoint a trustee and take a bond, is apparent from the act of 1805, ch. 110, sec. 2 and 3; 1808, ch. 71, sec. 1 and 3, and 1827, ch. 71. The filing of the petition cannot be necessary to the validity of these acts, because a judge, in the recess of the court, is expressly empowered to act when the petition is presented to him, conforming in its terms to the Act of Assembly.



In such a case the law does not require, nor does it conform to practice in such cases to file the petition before the action of the judge thereon. A case must be undoubtedly depending before the action of the court or a judge can be had, but such a case is depending, either before the judge or the court, when the petition is presented. We therefore think the court erred in pronouncing the proceedings void on such an hypothesis.

The next objection which has been alleged to the proceedings and judgment in this case is, that a prior application of the appellant was depending at the time of the application, upon which the discharge now in controversy was granted. This point was not raised in the court below, or if it was, was not decided by the court, but as it may again arise in the case, we think proper to say, that the principles heretofore adverted to in this opinion, are decisive of this question. The court of *Prince George's* county have proceeded to the final discharge of the appellant, which we are bound to respect, having seen that the jurisdiction of the court once attached by the presentation of the appellee's petition.

The jury have found, by their verdict, that property by descent, devise, bequest, &c., has come to the defendant, and it is proper, under these circumstances, that the case should be remanded.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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Nelson and wife *vs.* Bond.—1843.

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WILLIAM NELSON AND ELIZABETH HIS WIFE *vs.* JOSHUA B. BOND, SURVIVING PARTNER OF RICHARD BOND.—December 1843.

An action against husband and wife, founded on the note of the wife, made by her while sole in *Louisiana*, is not barred by her release before marriage, and after the maturity of her note, under the insolvent laws of *Maryland*. The plea of limitations is classed among those not deemed meritorious, and in relation to the reception of which, courts of justice act with care and strictness, and must be filed by the rule day.

A general continuance of a cause does not enlarge the time to file the plea of limitations.

Upon a note made in *Louisiana*, bearing ten per cent. interest until paid, this court will enter judgment accordingly.

APPEAL from *Harford* County Court.

This was an action of *Assumpsit*, brought on the 7th May 1839, by the appellee against the appellant, to recover the amount of a promissory note of *Elizabeth*, the wife of the appellant, made while sole, on the 1st April 1831, at *Donaldson*, in the *State of Louisiana*, payable twelve months after date, to *Joshua B. Bond* the appellee, and one *Richard Bond*, (since dead,) then partners in trade, &c., for the sum of \$136.63, bearing *ten per cent. interest*, for value received.

The parties, without further pleading, submitted the case to the county court on the following statement of facts, viz:

In this case it is admitted that the promissory note, which is the ground of the action, is the note of *Elizabeth*, now the wife of *William Nelson*, who together, are the defendants in this suit: that the same was duly executed, as it purports, at *Donaldson*, in the *State of Louisiana*, on the day of its date, and that at the time of its date aforesaid, the plaintiffs and the said *Elizabeth* resided in the *State of Louisiana*; that after the execution of the said note, the said *Elizabeth* removed to the *State of Maryland*, and there, to wit, in *Harford* county, on the 14th December 1837, applied for the benefit of the insolvent laws of said *State of Maryland*, and on the 17th March 1838, obtained a final discharge under said application, and was a short time afterwards, before the institution of this suit,

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Nelson and wife vs. Bond.—1843.

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married to the defendant *William*, and that said *Elizabeth* had no property when she applied for the benefit, and has not acquired any since. It is further admitted, that more than three years had elapsed from the time said note fell due till the institution of this suit, and that the defendants are to be considered as having all the benefit of a plea of limitations, pleaded by them at the *May* term 1841; and the plaintiff had moved the court to strike out the same, on the ground of its coming in too late under the following rules of *Harford* county court:

**ELEVENTH RULE.** The 1st day of January and the 1st day of June shall be the rule days, and whenever a rule is laid to declare or to plead, the declaration or pleadings are to be filed on or before the rule day. When a declaration or any other part of the pleadings is filed on or before the rule day, in pursuance of a rule previously laid, the adverse party shall be bound to answer the same, and to file the pleadings necessarily arising in succession on or before the second day of the next succeeding term; either party failing to comply with this rule may have judgment of *non pros*, or by default entered against him whenever the action is called up on the first going over of the docket, but the general issue plea may be pleaded by a defendant at any time before judgment by default is entered against him, although he hath not pleaded before the rule day; this however will never be considered a reason to delay the "trial."

**SIXTY-EIGHTH RULE.** Ordered, that all declarations, replications and other pleadings, shall be filed on or before the 1st day of May and the 1st day of November preceding each term of this court, and all rules to plead or declare shall operate to the said days respectively, and any party failing to comply with a rule to plead or declare, shall have judgment of *non pros* or by default, as the case may be, according to the rules of this court.

And had also replied, that the defendant *Elizabeth* had admitted the said debt in her insolvent schedule to be due when she applied for the benefit of the insolvent laws as aforesaid; and secondly, that by the laws of *Louisiana*, where the note



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was made, it would not be barred until ten years had elapsed from its date. And it is admitted that the said debt was inserted in the schedule of debts due and owing by the said *Elizabeth*, made and filed with her application for the benefit of the insolvent laws as aforesaid, and that by the laws of *Louisiana* the said debt would not be and is not barred until the expiration of ten years from its date.

It is agreed that this case be submitted to the court on the foregoing statement, and if the court shall be of the opinion that the plaintiff is entitled to recover, their judgment to be entered for the plaintiff, with interest, and costs. It is also admitted that ten per cent. is the legal rate of interest on said note by the laws of *Louisiana*. And if the court shall be of a contrary opinion, then judgment to be entered for defendants, with costs, either party to be at liberty to appeal.

WM. B. BOND, for Pl'ff.

OTHO SCOTT, for Def'ts.

The county court adjudged that the said *Joshua B. Bond* recover against the said *William Nelson* and *Elizabeth* his wife, the sum of \$136.63, with *ten per cent. interest* thereon from the 1st April 1831, till paid, and costs.

The defendants appealed to this court.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS and SPENCE, J.

By OTHO SCOTT for the appellants, and

By W. SCHLEY for the appellee.

SPENCE, J., delivered the opinion of this court.

The statement of facts in this case set forth that the action is instituted upon a promissory note executed by *Elizabeth Stansbury* to *Joshua B. Bond* and *Richard Bond*; that the note was made and executed in the State of *Louisiana*, and that at the time the parties were citizens of the said State; it is also admitted, that subsequently to the time of making the note, the defendant *Elizabeth* removed to the State of *Maryland*, and was discharged under the insolvent laws of *Maryland*, and

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intermarried with the defendant *William Nelson*. It is further admitted, that *Richard Bond* hath died, and *Joshua B. Bond* survived him.

The first reason presented to our consideration why this court should reverse the judgment of the county court, is, because the discharge of the wife while single under the insolvent laws of *Maryland*, is a bar to the recovery by the appellee in any of the courts in this State. We think this is not an open question in *Maryland*, since the decision in the case of *Frey vs. Kirk*, 4 G. & J. 509, in which this precise point was made, and after a full investigation of the authorities on the subject, this court decided the discharge was no bar to the action.

We are of the opinion, that under the statement of facts, the plea of limitations is out of the case. This plea is classed among those not deemed meritorious, and in relation to the reception of which, courts of justice act with care and strictness.

The limitation of time within which this plea might have been filed under the rules of *Harford* county court, expired on the 1st day of November 1840; the agreement states that the plea of limitations is not to be considered as filed sooner than May term 1841.

It is insisted, that the rule to plead was extended at Nov. term 1841, and thereby gave the defendant liberty to file this plea. This would be rather a strange effect, resulting from the plaintiff's courtesy to the defendant, if it conferred upon him a right which he had lost by his default, to wit, to plead any other plea than one to the merits. To adopt such a construction of the rules of court, would be to change the long established practice in most of the judicial districts in *Maryland*, a change which might not tend to promote the ends of justice.

JUDGMENT AFFIRMED.

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Leopard *vs.* C. & O. Canal Co.—1843.

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JACOB LEOPARD *vs.* THE CHESAPEAKE AND OHIO CANAL  
COMPANY.—*December* 1843.

Under the act of 1825, ch. 117, this court is not permitted to affirm or reverse the judgment of the county court upon any point, which is not shown by the record to have been *there* raised and decided.

A prayer to instruct the jury upon the foregoing evidence, that “the plaintiff “is not *in, the face of his said deed*, entitled to recover for any damage “done his mills by reason of the construction of the canal across said public road, and the destruction of said public road,” involves no question upon the pleadings in the cause—nor whether the facts proved sustain the allegations in the declaration: it concedes the sufficiency of the pleadings, and only seeks a decision on the isolated question of the legal effect of the deed referred to, and that thereby the testimony given in the cause showed no cause of action.

The question raised by this prayer bears no resemblance to the inquiries the court is called upon to make, where objection is raised to the admissibility of evidence *offered generally*, in a trial before a jury. In such case the attention of the court is necessarily called to the pleadings, the admissibility of the evidence being entirely dependent on them.

A demurrer is a direct attack on the pleadings themselves, whereon the court must of necessity inspect all the pleadings in the case, as well to enable it to ascertain the sufficiency of the particular pleading demurred to, as in giving its judgment thereon to mount up to the first material error in pleading.

Upon a motion in arrest of judgment the court have no means of judging of the validity of a verdict, but by referring to the pleadings and issues in the cause.

Before the court can grant an instruction that a plaintiff is not entitled to recover, it must assume the truth of all the testimony given to the jury tending to sustain his right to recover, and of all inferences of fact fairly deducible therefrom.

The *Chesapeake and Ohio Canal Company* has no right in cutting its canal across public highways, utterly to destroy them, and it is bound to unite, for the public accommodation, the highway thereby divided, by a reasonably convenient thoroughfare over or under its canal.

A deed from a party seized of land, conveying to the *C. and O. Canal Company* “such portion and quantity of his land as may be covered, used or occupied by the said canal, or the necessary works thereof,” and describing the premises conveyed, is not a contract to surrender the privilege of using public highways which passed through the granted premises.

In construing a deed made to a canal company for the purposes of its works, the court will presume that the parties to it understood their relative rights, powers, and duties, in respect to the subject matter of their contract.



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APPEAL from *Washington* County Court.

This was an action of *trespass upon the case*, commenced on the 18th February 1841, by the appellant against the appellee.

The appellant declared, that whereas the plaintiff on, &c., at, &c., long before, was and from thence hitherto hath been, and still is the proprietor and possessed of a water mill for the grinding of rye, &c., of a saw mill for the sawing of boards, &c., which said mills, until the committing of the grievance by the defendant hereinafter mentioned, were of great value to the plaintiff, and yielded and produced him great annual gains and profits; but for the grievance hereafter mentioned, would still be producing and yielding him great annual gains and profits. And whereas the plaintiff during all the time aforesaid, of right ought to have had, and still of right ought to have the use of a certain road passing through and over a certain close of the plaintiff and unto the said mills, for the plaintiff and his servants and his customers to the said mills to go, return, pass and re-pass, to and from the said mills with horses, &c., at his and their free will and pleasure, when, and as often as they required, for the purpose of carrying grists and saw logs and other timber, and wheat and rye and corn, &c., and other custom to the said mills as aforesaid, to wit, at, &c. Yet the defendants well knowing the premises, whilst the plaintiff was of right entitled to the use of the said road as aforesaid, to wit, on the day and year aforesaid, wrongfully and injuriously cut, dug and made, and caused to be cut, dug and made, a certain canal called the *Chesapeake and Ohio Canal*, of great width and depth, to wit, of the width of sixty feet and of the depth of ten feet, with high and huge embankments, to wit, of the height of ten feet and of the breadth of twenty feet at the base, in and along the whole length of the lands and premises of the said plaintiff, and in and across the said public road, and continued and kept the said canal so cut, excavated and made as aforesaid, from the day and year aforesaid, to the time of the issuing of the writ original in this cause, and the said public road during all that time hath been obstructed, shut up, closed up and rendered impassable for the said plaintiff and his servants, and for his

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customers to his said mills, and during all that time the plaintiff and his servants, and the customers having business at his said mills, have been unable to pass and re-pass, to go to and come from the said mills with their horses, carts, wagons and other vehicles, as they of right ought to have done, to wit, at the county aforesaid. By means of which said premises the plaintiff has been deprived of, and has lost during all the time aforesaid, the use, benefit and advantage of his said mills, and has lost and been deprived of all his gains, tolls and profits and custom, which without the said obstructing he would have derived from his said mills, to wit, at the county aforesaid.

And whereas also, heretofore, to wit, on the day and year aforesaid, at the county aforesaid, the plaintiff was and still is seized and possessed of a certain farm, which until the committing of the grievance hereinafter mentioned, was free from all overflowing and injury from being flooded with water, and until the committing of the grievance hereinafter mentioned, was sound, dry and firm land, and produced large quantities of grain, and of grass and hay, to wit, at the county aforesaid, yet the defendant knowing the premises, unlawfully cut, dug and placed a certain canal called the *Chesapeake and Ohio Canal*, along, through and by the said land of the plaintiff, and so negligently, imperfectly and improperly made and constructed the embankments and other works of the said canal, that the water of the said canal has percolated and passed through the said embankments of the said canal and overflowed, submersed, flooded and greatly injured the lands of the plaintiff adjacent to, and lying along the said canal, and the plaintiff from the day and year aforesaid, to the day of the impetration of the writ original in this cause, by reason of the said flooding and inundation, has lost all the use and profits and benefit of the said land, and has been unable to produce either grain or grass on the said land, or to apply the same to any useful or profitable account or purpose, to the damage of the plaintiff of five thousand dollars, and therefore he brings suit, &c.

The appellees pleaded: 1. Not guilty. 2. Not guilty within three years. On these pleas issues were joined.

The plaintiff to support the issue on his part joined in this case, proved by competent testimony, that he was as far back as the year 1820, and still is, seized and possessed in fee of a tract of land or farm, lying and being in the county aforesaid, on which there have been and still are a grist mill and saw mill; that ever since he has so owned said farm and mills, there has been a public county road leading through his said farm, and to and by his said mills, on which road numerous persons residing in the neighborhood and country around, and considerably distant in *Pennsylvania*, have travelled to and from his said mills for the purpose of having their grain ground and made into flour and meal; and also to have their timber sawed into plank and scantling, and that there was no convenient way for the customers of said mills, residing in *Pennsylvania* and *Maryland*, or for the plaintiff himself to have access to the same except on and along said public road; that before the cutting and making of the canal as hereinafter stated, and up to the time of bringing this suit, the plaintiff derived and received as profits from said mills large sums of money; and that the said mills were capable of producing or manufacturing twenty barrels of flour per day; and sawing from 800 to 1000 feet of plank per day, and would produce in that way clear profits for the plaintiff equal in value to the sum of \$1,000 per annum. The plaintiff further to support the issue on his part joined, proved by competent testimony, that the defendant made and constructed the *Chesapeake and Ohio Canal* through the said land or farm of the plaintiff and near his said mills, and in constructing the same, dug up, excavated and wholly destroyed so much of said public road as to cut off thereby all communication by said road, with said mills by the customers thereof, as also by the plaintiff himself; and that ever since the said canal has been so constructed, and the said public road so dug up, excavated and wholly destroyed by the defendant, the plaintiff's said mills have not been used by said plaintiff, and have become entirely useless and unproductive to him, and have stood idle, and the customers of the same have been deprived of the use of said road for the purpose of going to and



from them to have their grain ground and their timber sawed into plank and other lumber, as they were accustomed to do before the said road was destroyed by the making of the said canal.

The defendant then to support the issue on his part joined, offered in evidence the following deed from the plaintiff and his wife to the defendant:

“This indenture, made this 24th July 1835, between *Jacob Leopard* and *Delia Leopard* his wife, of, &c., of the one part, and “the *Chesapeake and Ohio Canal Company*” of the other part: whereas the said canal is intended to pass through the lands of the said J. L., who have contracted and agreed to sell to the said company, such portion and quantity thereof as may be covered, used or occupied, by the said canal, or the necessary works thereof, in perpetuity, for which purpose the said J. L. and D. L. his wife, are willing to execute these presents. Now, therefore, this indenture witnesseth, that the said J. L. and D. L., for and in consideration of the premises, and also in consideration of the sum of \$1,075, to them in hand paid by the president and directors of the said company, &c., have granted, &c., unto the said C. and O. C., and unto their successors in perpetuity, all the following described pieces or parcels of land, lying in *Washington* county aforesaid, beginning, &c., thence describing thirty courses, containing 19 acres, 2 roods and 35 perches. Together with all that other piece of land lying adjacent to that above described, and between it and the *river Potomac*. Beginning, &c., containing, &c., with all privileges, &c., appurtenant. To have and to hold the said lands and premises unto the said C. and O. C. C. and their successors in perpetuity, to the only proper use, benefit and behoof of the said C. and O. C. C. and their successors in perpetuity, and to and for no other intent, use or purpose.”

It was admitted that the land on which said public road was and run, is a part of the land conveyed by said deed to the defendant, and that that part of said road that was destroyed by the said defendant ran over the same. It was further admitted that the land so conveyed, is the very land upon which

the said canal has been constructed, and that the said canal has been constructed in all respects in accordance with the charter.

The defendant, thereupon moved the court to instruct the jury that upon the foregoing evidence, the plaintiff is not, in the face of his said deed, entitled to recover for any damage done his mills by reason of the construction of the canal across said public road, and the destruction of said public road; which instruction the court accordingly gave. The plaintiff excepted.

The verdict and judgment being for the defendant, the plaintiff prosecuted this appeal.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS and SPENCE, J.

By PRICE and F. A. SCHLEY for the appellants, and  
By J. T. MASON and TIDBALL for the appellees.

DORSEY, J., delivered the opinion of this court.

The bill of exceptions, on which the present appeal is founded, presented for decision in the court below no question upon the pleadings in the cause. Whether the declaration states facts sufficient, if proved, to enable the appellant to maintain his action, or whether the facts proved sustain the allegations in the declaration? are questions which, in the case before us, under the act of 1825, ch. 117, we are not called on to decide. We are not permitted to affirm or reverse the judgment of the county court, upon any point which is not shown, by the record, to have been there raised and decided. The matter brought up for review in this court is the granting, by the court below, of the appellee's prayer for an instruction to the jury, that upon the evidence given in the cause, "the plaintiff (the appellant,) is not, in the face of his said deed, entitled to recover for any damage done his mills, by reason of the construction of the canal across said public road, and the destruction of said public road." The prayer as made to the court, for the purpose of obtaining its determination thereof, since the act of 1825, concedes by implication the sufficiency of the pleadings in the cause; and so far from inviting the court to the examination

thereof, or raising any question thereon for its decision, it in effect withdraws them from its consideration, and invokes it to decide the isolated question whether such were not the legal effect and operation of the deed referred to, that, thereby the testimony given in the cause showed no cause of action in the appellant. The question raised by the prayer made to the court below bears no resemblance to the inquiries which the court are called on to make where an objection is raised to the admissibility of evidence offered, generally, in a trial before the jury. There the attention of the court is necessarily called to the pleadings in the cause; the admissibility of the evidence being entirely dependent on them. The court cannot judge of its pertinence or materiality but by their inspection. Nor is it like the case of a demurrer, which is a direct attack upon the pleadings themselves, wherein the court must of necessity inspect all the pleadings in the case, as well to enable it to ascertain the sufficiency of the particular pleading demurred to, as in giving its judgment thereon to mount up to the first material error in pleading. Nor does it resemble a motion in arrest of judgment, where the court have no means of judging of the validity of a verdict, but by referring to the pleadings and issues in the cause, upon which it wholly depends, and without which it has no operation, and is incapable of forming the basis of a final judgment in the cause.

The leading motive of the legislature in passing the act of 1825, was to remedy an evil which had been severely felt and was loudly complained of, that in this court the judgments of the county court were reversed upon points never raised or decided below, and which, had they been there raised, would at once, by amendment or otherwise, have been obviated and never been presented for the consideration of the appellate court. Such is the nature of the objection now taken in this court, and such would have been its fate if raised in the county court. It is that the plaintiff below could not recover, because his cause of action has been defectively stated in his declaration, though fully established by proof. Whether this defect exist or not, we have deemed it unnecessary to inquire; be-



cause the defect, if true, is excluded from the consideration of this court by the express words and legislative intent of the act of 1825. A different decision would, in a great degree, virtually operate as a repeal of the act of 1825.

Before the county court could grant the instruction prayed for, it must assume the truth of all the testimony given to the jury, tending to sustain the plaintiff's right to recover, and of all inferences of fact fairly deducible therefrom. And must also determine, that so far as the rights of the appellant are concerned, the appellee had authority, for ever, to destroy that part of the public highway crossed by the canal. Assuming the non-existence of this right, whatever may be the imperfections of the declaration in the cause, we are clearly of opinion, that the testimony before the jury, if believed by them, was abundantly sufficient to entitle the appellant to a verdict. See the cases of *Chichester vs. Lethbridge*, Willes' Rep. 71. *Rose and others vs. Miles*, 4 M. & S. 101. *Hughes vs. Heiser*, 1 Binney, 463. *Greasley vs. Codling and another*, 2 Bingham, 263. *Wilkes vs. Hungerford Market Company*, 2 Bingham's New Ca. 281; and *Stetson vs. Faxon*, 19 Pick. Rep. 147.

The authority of the *Chesapeake and Ohio Canal Company* to destroy this public highway, and to perpetuate its destruction, has in the argument been claimed to exist under two distinct grants; the one emanating from the sovereign power of the State, through which the canal passes; the other from the appellant himself. Under the first, the charter of the *Chesapeake and Ohio Canal Company*, it is, in effect, asserted in the argument, that it has the power conferred on it, of occupying as its site, and of destroying by crossing, and perpetuating the destruction of every public highway between the *City of Washington* and the *Ohio River*. Such a proposition we think is not warranted by any act of legislation before us, and nothing but a grant of such a power in terms the most full and unequivocal, would induce this court to believe that the legislatures referred to, designed to confer it. Such terms are not to be found in the charter of the canal company, and we do not deem it necessary to use arguments or illustrations to show the non-existence of such a power.

Assuming then that the *Chesapeake and Ohio Canal Company* has no right, in cutting its canal across public highways, utterly to destroy them, and that it is bound to unite, for the public accommodation, the highway thereby divided, by a reasonably convenient thoroughfare over or under its canal; has the appellant by the deed of conveyance he has executed to the company, precluded or estopped himself from claiming a right to use the highway thus illegally destroyed by the canal company? That a public prosecution for a nuisance might be sustained for this destruction of the highway, is we think quite clear, and that all persons, other than the appellant, who, by reason of this obstruction or destruction of the highway, have sustained any special or particular injury or damage, may maintain an action on the case against the canal company, appears to us, a proposition equally manifest. Is there, in the deed referred to, any stipulation or covenant, or any thing from which it can be implied, that the appellant contracted to surrender or disrobe himself of this privilege of using the public highway? a privilege possessed by every other citizen of the State. If there be, we have not discovered it. In construing this deed we must presume, in the absence of all proof to the contrary, (if indeed we could look to such proof, were it before us,) that the parties to it understood their relative rights, powers and duties, in respect to the subject matter of their contract. The parties then knowing that the canal company were bound to re-construct and keep open the highway for the benefit of the public, could the appellant suppose, that in executing the deed before us, he surrendered for ever a highly valuable privilege, of which every other member of the community was left in the free and uninterrupted enjoyment. What motive could he have had in making, or the canal company in exacting, such a surrender? The record discloses nothing from which we can be induced to believe that it was the intention of the parties to the deed, that such a sacrifice should have been made. And if in construing the deed we could look to the proof in the record, we could not be induced to believe that the appellant knowingly assented to it. That an annual

income of one thousand dollars, pertaining to realty, and which might endure forever, would, for the gross sum of \$1,075, be surrendered and forever abandoned, cannot in our opinion be predicated of the appellant, under the circumstances of this case. The doctrine of estoppel, so much relied on in the argument, we regard as wholly inapplicable to the case before us. The appellant claims no privilege; asserts no right inconsistent with his grant.

CHAMBERS J. dissented, and delivered the following opinion:

I concur with the majority of the court in the opinion that the canal company was under a legal obligation in a reasonable time to provide a safe and sufficient passage way for the public, in lieu of the public county road which their charter permitted them to dig up and convert into the site of their canal, and that the injury to the plaintiff was of a character, according to the plaintiff's testimony, to entitle him to recover in a proper form of action. Still, in my opinion, the instruction of the court below was properly given, that the plaintiff could not recover for any damage done his mills by reason of the *construction of the canal across said public road*, and the *destruction of said public road*. According to my view, the words, "in the face of his said deed," in no degree affects the case. The deed certainly had the effect to confer a right on the company to open the canal, but the most that it seems to me can be made of the introduction of these terms, is to consider them as intended as a reason why the legal proposition asserted, was true. How far the reason, if it be intended as a reason, which influenced the counsel in moving the instruction, was adopted by the court, there is nothing in their language to disclose, but it is not with the reasons, real or imputed, that we have to deal. The proposition of law expressed by the court is, that the plaintiff could not recover. Recover where, when, how? Was it intended that the facts deposed to, would not, in any future suit, in any court, at any time, form a ground of action? I think not, but that on the contrary, the application must be to that particular action then on trial.



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If to the instruction as asked, had been supplied the words, "in this action," or, "in this form of action," it could not be denied, I presume, that the court must have looked to the declaration to see whether it enabled the plaintiff to recover. Now I have not been able to comprehend the legal distinction between the different expressions in an instruction, "could not recover in this form of action," "could not recover in this action," or "could not recover." It is said the act of 1825, ch. 117, shuts out all questions not shewn by the record to have been decided by the court below. Admitted. But the very question at issue is, "was the point raised in the court below." The true interpretation of that act is the precise matter of debate.

Since the earliest days of judicial history it has been an axiom, that a plaintiff cannot bring a suit for one thing and recover a different thing. The familiar illustration is, you shall not sue for a horse and recover an ox. Did the act of 1825 design to change this fundamental principle? I cannot think its letter or spirit justify us in saying so; yet with due deference, it appears to me such is the plain result of the doctrine which will condemn the opinion of the court below. The principle now proposed to be adopted is, that you must look *alone* to the evidence, entirely disregarding the pleadings, and if the case made by the evidence entitles the plaintiff to recover, the court will not be permitted to give such an instruction as the present.

Now if the action be for injury to a horse, and the proof be of injury to an ox, the plaintiff, looking only to the case made by the proof, *is* entitled to recover, because, according to the principle assumed, he has made out a case by proof for which he could maintain an action, if his pleadings had conformed to the character of his proof. The pleadings however, it is said, are to be totally disregarded, and in effect, the case is to be treated in all respects in this court as if the pleadings were technically suited to the evidence.

It may well be said too, that there is a more general sense in which both may be included within the same descriptive terms.

The horse and the ox as properly belong to the same family of "beasts," as the "public county road" and the "canal," or "bridge," do to the family of "highways."

If suit is brought for a particular species, it is not enough to prove title to another species of the same genus, else we should find no stopping point short of the universal term of "property," or something similar, which should include every thing to which title could be made. But where will be the end of this principle of interpretation in its practical difficulties? The case of ejectment or replevin will best illustrate it. The replevin is instituted for a horse; the proof is that defendant seized and carried away a horse, and also an ox, from the plaintiff's enclosures; the defendant proves title to the horse, but makes no defence in proof as to the ox.

The defendant in a motion reciting the evidence which proves his title to the horse, asks an instruction to the jury, that if they believe this evidence "the plaintiff cannot recover." The court refuse the instruction, and according to the principle assumed, their decision must be affirmed in this court. In such a case what judgment is to be entered? Plaintiff has no title to the article for which his replevin was instituted, but he has proved title to another article, for which, is he entitled to judgment? And may not the same doctrine, when carried out to its inevitable results, be applied to the case of an ejectment for land, in which a recovery may be had for a horse? It does not remove the difficulty to say that objection may be taken below to the admissibility of the testimony. If the testimony was not admitted, the case does not arise, and it is very true, if there is no case, there is no difficulty. But the matter in hand is how to dispose of the difficulty when the case *does* arise. I cannot agree that the act of 1825 was designed to insulate a question to an extent subversive of the most fundamental rule in the history and nature of suits at law. On the contrary, it is my opinion, that an instruction like the present, "that the plaintiff cannot recover," not only authorises, but imperatively demands from the court, a reference to the character and nature of the plaintiff's claim, and that as the plain-

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tiff in this case claimed damages *alone*, for cutting and digging the canal in and across the public road, and thereby destroying it, he cannot recover for the failure of the canal company to provide some other proper passage way for the "public county road," which they had the right to dig up and destroy, and consequently, that the court below was not in error.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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JOHN E. BERRY vs. HENRY A. PIERSON AND WIFE.—*December 1843.*

After a sale of a tract of land, the vendor, in consideration of natural love and affection, under his hand and seal assigned the unpaid purchase money to one of his grand-daughters, and then devised the land to his four grand-daughters, including his grantee, "to be equally divided among them." Upon a bill filed by the grantee of the purchase money against the vendee, the executors of the vendor and her co-devisees, the latter agreed to a division of the balance of the purchase money among themselves, and to unite in a conveyance upon its payment, but one of the executors excepted to the averments of the bill under the act of 1832, ch. 302, on the ground that it did not charge him with the receipt of purchase money. **Held:** that the sufficiency of the bill upon the appeal of that executor as against him, was open to the consideration of this court.

Where a bill is properly excepted to upon the ground of the insufficiency of its averments to charge a party proceeded against, whatever may be the proof, no decree can be pronounced against him.

Proper and sufficient allegations in a bill are necessary to prevent surprise and consequent injustice.

One who is executor, and as legatee claims a right to purchase money received by him, is a proper party to a controversy to settle the right to the fund, that full and complete justice may be administered to all the persons interested in its distribution.

Where a defendant consents to the ratification of an audit which charges him with a sum of money, this is sufficient evidence of its receipt by him.

Where a bill gives a defendant no intimation that any claim would be made against him, but the demand appears in the proof, he may by way of exception to the auditor's report, rely upon the act of limitations, and it is no objection that it was not taken in the answer.

The defence of limitations may be taken in equity as soon as by the proceedings, the party has notice that any claim was to be made against him.

A party who receives money as a *quasi* trustee, as for the use of those to



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whom it belonged, not as acting under a continuing or express trust; whose duty it is to pay over immediately on its receipt, is liable to an action at law, and the act of limitations begins to run from the time of the receipt.

Where limitations are relied on in equity, and the court therefore deem it fruitless to proceed with the cause, though the claim could in other respects be maintained by an amendment of the pleadings, it will not be remanded.

APPEAL from the Court of Chancery.

On the 25th February 1835, the appellees filed their bill against *John T. Berry, Deborah Waring, William Edmonds and Rebecca* his wife, *John E. Berry, Otho B. Beall and Priscilla Waring*, alleging that on or about the 1st July 1826, a certain *Benjamin Berry*, late of, &c., (who has since departed this life,) the grand-father of your oratrix, being seized in fee simple of a certain tract, parts of tracts or parcels of land, with the appurtenances, situate, lying and being in *Prince George's* county aforesaid, commonly called "*Good Luck*," containing, or supposed to contain 250 acres, more or less, and being desirous of selling the said land, and a certain *John T. Berry* (one of the defendants hereinafter named,) being disposed to purchase the same, a contract was accordingly on the day and year aforesaid entered into, by and between the said B. B. and the said J. T. B. for the sale and purchase thereof. The said J. T. B. agreeing to pay, and the said B. B. agreeing to take for the said land and premises the price and sum of thirteen dollars per acre, so that the entire purchase money amounted to the sum of \$3,250, interest being payable thereon from the day and year aforesaid; and your orator and oratrix further shew unto your honor, that the said J. T. B. paid to the said B. B., at the time of making said contract of sale, the sum of fifteen dollars on account and in part of the said purchase money, for which amount the said B. B., as your orator and oratrix are informed, passed to the said J. T. B. his receipt in writing of that date; and the said J. T. B. was thereupon immediately let into the possession of the said lands and premises, and has always since continued to use, enjoy and occupy the same. And your orator and oratrix also state unto your honor, that some time after the making of the said contract of

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sale, to wit, on the 15th October 1827, the said B. B. executed a certain instrument of writing, his own proper hand and seal being thereto signed and affixed, and thereby for and in consideration of the natural love and affection which he bore unto your oratrix, his grand-daughter, (then named *Eleanor Waring*) gave, assigned and transferred unto her the purchase money aforesaid, as will more fully and at large appear by reference to a copy of the said instrument of writing, which is herewith filed, marked A, to which your honor is referred, and asked to consider as a part of this bill of complaint. And your orator and oratrix aver, that the said J. T. B. was duly notified of the execution of the said instrument of writing, purporting to be an assignment of the said purchase money to your oratrix, very soon after the same was executed, to wit, on or about the 1st November in the year 1827, aforesaid. And your orator and oratrix further represent unto your honor, that the said B. B. in his lifetime was always ready and willing to perform his part of the said contract, and if the said J. T. B. had paid to your oratrix the purchase money aforesaid, with the interest thereon, would have conveyed to him in fee simple the land and premises aforesaid. But the said J. T. B. in the lifetime of the said B. B., wholly failed to make any payment in addition to the one herein before mentioned, either to the said B. B., or your oratrix his assignee, so that the said B. B. departed this life without making him any conveyance or deed for the same; that the said B. B. a short time before his death, to wit, on the 8th December 1827, made and executed in due form of law, his last will and testament in writing, and thereby devised the said land and premises aforesaid, to his four following grand-daughters, to wit, your oratrix and her three sisters, *Deborah Waring*, *Rebecca Waring*, now the wife of one *William Edmonds*, and *Priscilla Waring*, at present residing in *Montgomery* county in the State of *Ohio* aforesaid, as will appear by reference to an extract from the said will, herewith filed as exhibit B, which your orator and oratrix pray may be also taken and considered as a part of this bill of complaint, in consequence of which devise, your orator and oratrix are

advised, that the legal title to the lands and premises in question on the death of the said B. B. passed to your oratrix and her said sisters as tenants in common, and she therefore prays that her said sisters and the said W. E., the husband of the said *Rebecca*, may be made defendants to this bill of complaint. Your orator and oratrix also state, that the said B. B. by his said will, appointed a certain *John E. Berry and Otho B. Beall*, two of the defendants hereinafter named, and *Spencer Mitchell*, executors thereof; and the said *Spencer Mitchell* having declined accepting the trust confided to him in part by the said will, letters testamentary were in due form of law granted thereon to the said *John E. Berry and Otho B. Beall*; and your orator and oratrix further represent unto your honor, that the said J. T. B. being as aforesaid, notified of the assignment which your oratrix held of the purchase money aforesaid, afterwards made her the following payments on account thereof, to wit, on the 24th October 1828, the sum of \$131.98, and on the 30th July 1832, the sum of \$56.56; and your orator and oratrix therefore well hoped that the said J. T. B. would have paid to them the balance of the said purchase money, the whole thereof being long since due with interest as aforesaid, as in equity and conscience he was bound to do. But now so it is, that the said J. T. B. has hitherto wholly refused to pay to your orator and oratrix the balance of the said purchase money and interest or any further part thereof, sometimes pretending that he, the said J. T. B., is and hath always been ready and willing to perform the said agreement on his part, but that he cannot obtain a good and marketable title to the said land and premises, whereas your orator and oratrix charge, that the title which passed to your oratrix and her said sisters as aforesaid, under the will of the said B. B. is good and valid, and that your orator and oratrix are willing, as far as they can, to convey the same to the said J. T. B., upon being paid the balance of the said purchase money with the interest thereon; and they are further advised and insist, that your honor will compel the said *Deborah, Priscilla and Rebecca*, and the said *William Edmonds* her husband, on payment thereof, to join



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with your orator and oratrix in such conveyance as may be necessary for conveying to the said J. T. B. the said title. And at other times, the said J. T. B. and the said *Deborah, Priscilla, William* and *Rebecca* his wife, pretend that your orator and oratrix are not entitled to receive the entire balance of the said purchase money, &c., but that the said sisters of your oratrix are entitled to equal proportions thereof, whereas your orator and oratrix insist, that in virtue of the before mentioned assignment, they are exclusively entitled to the same; and upon other occasions, the said J. T. B. and the said J. E. B. and O. B. B. as the executors of the said B. B., pretend that the said executors are entitled to receive the purchase money aforesaid, and insist that he, the said J. T. B. has made payments to them, for which he ought to be allowed a credit, all which actings, doings and pretences of the said defendants are contrary to, &c., and tend, &c. Prayer that J. T. B., D. W., W. E. and R. his wife, P. W., J. E. B., and O. B. B., executors of B. B., may, upon their respective oaths, true answers make, &c., and that an account may be taken of what is now due your orator and oratrix on account of the purchase money aforesaid, and interest, and that the said J. T. B., may by decree, be compelled to pay the same, or that the said lands and premises may be decreed to be sold in satisfaction thereof, your orator and oratrix insisting, that in virtue of the aforesaid assignment, they have an equitable lien thereon for that purpose; and that the said D. P. W. and R. his wife, may be decreed to unite with your orator and oratrix in such conveyance or deed, as may be necessary for transferring and assuring to the said J. T. B. and his heirs on payment of the said purchase money and interest the title aforesaid, and that your orator and oratrix may have other and further relief in the premises, &c.

EXHIBIT A: *Know all men by these presents*, that I, *Benjamin Berry*, of, &c., for and in consideration of the natural love and affection, which I have and bear unto my grand-daughter *Eleanor Waring*, have given, assigned and transferred unto her, all the purchase money for a tract of land called *Good Luck*, which I lately sold to a certain *John T. Berry*, and I do

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hereby authorise the said *Eleanor Waring* to receive the said purchase money, and to sue for and recover the same; and in case the said *John T. Berry* should fail to pay for the said land, I hereby give the same to her. Witness my hand and seal this 15th day of October 1827.

BENJAMIN BERRY (Seal.)

EXHIBIT B: Extract from the will of the late *Benjamin Berry*.

“*Item.* To my four grand-daughters *Eleanor, Deborah, Priscilla* and *Rebecca Waring* and their heirs forever, I give and devise all the lands purchased by me of *William Kilty* and *Walter S. Chandler*, and that part of the land purchased of *John Kadle*, which my said grand-daughters did occupy, and which is separated from the lands given by me to my son *John E.* by the courses and distances, &c., described by me in a deed to my said son *John E.*, bearing date the 15th day of March 1826, the said lands to be equally divided among my said grand-daughters.”

The separate answer of *John E. Berry* admitted, that it is true that B. B., about the 1st of July 1826, sold to a certain J. T. B., a tract of land called “*Good Luck*,” lying and being in *Prince George’s* county, and containing about one hundred and forty-four acres, and not containing two hundred and fifty acres, as stated by the said complainants, and that the said B. B. sold the said land to the said J. T. B., at and for the sum of thirteen dollars per acre, and not for the sum of fifteen dollars per acre, as stated by the said complainants, and this respondent denies, that the said J. T. B. was to pay interest on the purchase, from the 1st of July 1826, as alleged by the said complainants, but agreed to pay interest only from the 1st of January 1827, when he took possession of said land. This respondent is competent to speak and depose particularly respecting the terms of said contract, because he was present when the same was entered into between the said parties. This respondent further admits, that the sum of fifteen dollars was paid, on the day stated by the said complainants, by the said J. T. B., in part of the said purchase money for said land, and a receipt given him for the same by the said B. B., with regard to the assignment mentioned by the said com-

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plainants, and marked exhibit A. This respondent alleges, that sometime in the year 1834, the complainants had recorded among the land records of *Prince George's* county, such an instrument, (and which was the first notice this defendant had of such pretended assignment,) purporting to have been executed by the said B. B. in his life time, who was the father of this respondent, but whether the same was in fact executed by the said B. B., or is altogether a spurious instrument, this respondent is wholly unable to say, and prays that this honorable court will require of the complainants the strictest proof of its authenticity and genuineness; and he is advised and insists, that if it is genuine, it is nevertheless void in law, and conveys no interest to the        of the complainants; and this respondent cannot positively say whether the said J. T. B. ever had any notice of said pretended deed of assignment or instrument of writing, but does not believe that he ever had. Further answering, this respondent expressly denies that the said B. B., in his life time, was ever willing, or intended to convey the said land to the said J. T. B., in fee simple, upon his paying the purchase money for the same to the said complainant *Eleanor*, as alleged by these complainants, and consequently, by his last will and testament gave and devised the said tract of land, together with other parcels or tracts of land, to his four grand-daughters, to wit, the complainant E., D. W., *Rebecca*, now wife of W. E., and P. W., and as stated by the said complainants, as appears from the extract taken from said will, which is a true extract, and marked exhibit B, by the complainants, and made a part of their bill of complaint. This respondent admits that the said will bears date the 18th of December 1827. This respondent further admits, that the said B. B., by his last will and testament, appointed himself, O. B. B., and a certain *Spencer Mitchell*, his executors thereof, and that after the said *Spencer Mitchell* declined accepting the trust confided to him in part by the said will, letters testamentary were in due form granted thereon to this respondent and the said O. B. B. Further answering, this respondent says, that he does not know that the said J. T. B. ever made any payments



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to the said complainants, or either of them, in virtue of said pretended assignment; that this complainant, as one of the executors of B. B. aforesaid, about the 20th October 1828, gave the said complainant *Eleanor*, an order on the said J. T. B., which he believes was accepted and paid, and he presumes that this is the first payment mentioned by the said complainants as having been made by the said J. T. B. to them, in virtue of the said assignment, and this respondent states that he recollects that about the last of July 1832, he gave, as executor as aforesaid, a similar order on the said J. T. B., in favor of the said E., and which he believes was accepted and paid by the said J. T. B. in pursuance of this respondent's order; and this respondent further states, he never did recognize the said complainant E. as assignee of the purchase money for said land, and he does not believe that J. T. B. ever did, and he believes that this last mentioned order as the second payment of \$56.56, alleged by the said complainants to have been made them by the said J. T. B., in virtue of said assignment. This respondent further answering, says, that it is true that he has always denied the right of the complainants, or either of them, to receive any part of the said purchase money from the said J. T. B., and always claimed the right to receive it himself as one of the executors, and believed that he was entitled to it as residuary legatee of his father, and that the said J. T. B. has, at divers times, made this respondent, as co-executor as aforesaid, large payments on account of said lands, and has also, he believes, made the said O. B. B., as co-executor of said B. B., large payments on said land, for which he is entitled to a credit. And this defendant denies all and all manner of confederacy, &c.

The other parties having answered the bill or been proceeded against by publication, it was then agreed that the bill should be treated as amended, by charging that the assignment by B. B., deceased, to the complainant E., mentioned in the proceedings, was intended and designed for the common benefit of herself and sisters, and that the devise of the land sold by said *Berry* to the defendant J. T. B., which is to be found in the last will

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and testament of the said *Berry*, deceased, was made to give full effect to the aforesaid assignment to the said complainant, *E.*, and also, by stating the agreement between the said *B.*, deceased, and the said defendant *J. T. B.*, in regard to the price of the land sold as aforesaid and the period from which the purchase money is to bear interest, so as to conform to the admissions contained in the answers in these respects; that the answers already filed shall be treated as answers to the said amendment, and the testimony is to be treated as testimony taken after issue joined upon such amended bill and answers thereto. It is further agreed, that if the Chancellor shall decree in favor of the complainants, the cause shall go to the auditor for an account, and liberty shall be given to each party to introduce testimony before the auditor in regard to the precise quantity of land sold.

The defendant *John E. Berry* filed his points and exceptions as follows, to wit:

1st. That the assignment to *Eleanor Waring*, referred to in the bill of complaint, was fraudulent and void, and was not recorded as it ought to have been.

2nd. That the devise to the said *Eleanor* and her three sisters, under the will of *Benjamin Berry*, of the tract of land called *Good Luck*, sold to the defendant *John T. Berry*, was a void devise, he having sold the said lands to *John T. Berry* anterior to his death.

3rd. That the proceeds of said sale to *John T. Berry* belonged to *John E. Berry*, as residuary legatee under the said *Benjamin Berry's* will.

4th. That the complainants cannot recover against the said *John E. Berry* in this case, because the Chancellor has not jurisdiction; they should have sued him at law to recover such part of the money claimed by them as they could prove this defendant had received from *John T. Berry*, and failed to pay it over to them.

5th. Because they do not ask for a decree against this defendant, and such a decree does not come within the scope of their bill, nor within its prayer.

EXCEPTIONS of *John E. Berry* to the sufficiency of the averments and allegations in the complainant's bill.

1. There is no averment or allegation in the complainant's bill that *John E. Berry*, as executor of *Benjamin Berry*, received any payments from *John T. Berry* on account of the purchase of the tract of land called *Good Luck*, mentioned in the proceedings, as there ought to have been to authorise a decree against *John E. Berry* in this case.

2. The bill does not aver or allege that *John E. Berry*, as trustee, executor or agent, received any payments from *John T. Berry*, as it ought to have done to authorise a decree against him.

On 5th November 1841, the Chancellor (BLAND,) ordered that this case be and the same is hereby referred to the auditor, with directions to state an account, shewing the amount of the purchase now due to the said devisees of the vendor, to whom the vendor's lien has passed. The purchaser *John T. Berry* and the executor *John E. Berry* are to be regarded as the only defendants personally liable, the purchaser on the ground of his contract, and the executor on the ground of his receipt and failure to apply the money, as in equity he was bound to do. The parties are hereby authorised, according to the terms of their agreement, filed on the second instant, to have a survey made of the land sold, by the surveyor of *Prince George's* county, or to take testimony in relation to the said account, before any justice of the peace, on giving three days notice, provided that such survey be made or testimony taken and filed in the chancery office, in this case, on or before the 15th day of January next.

A survey was accordingly made, and the quantity of land sold admitted.

On the 8th March 1842, the auditor reported accounts A and B.

Account A is a statement of the debt due by the defendant *John T. Berry*, for his purchase of land from *Benjamin Berry*, deceased, in which he is charged with the purchase money, according to the agreement filed 2nd November 1841, and



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credited with the several payments admitted and proved to have been made to the executors of the deceased, as well as to the complainant *Eleanor* and her sisters. The balance shown to be due with interest to the date of this report, has been distributed, at the foot of this account, amongst the complainants and the defendants, sisters of the said *Eleanor*. This distribution has been made, although the sisters are not complainants, because the complainants have called upon them to join in a conveyance on the payment of the balance of the purchase money, and the defendant *John T. Berry* has offered himself ready to pay the same, whenever directed so to do.

In account B, *John E. Berry*, one of the executors of the deceased, has been charged with that part of the purchase money received by him from the defendant *John T. Berry*, and with interest thereon to the date of this report. The amount shown by this account has, at the foot thereof, been distributed in the same manner and for the same reasons as in account A, and in making that distribution the auditor has credited the executor with his payments to the complainant *Eleanor*, before her marriage, and to the defendant *Priscilla*, by deducting the same, with interest, as charged to him in the account, from their respective shares.

The defendant *John E. Berry*, excepted to the auditor's report and statement made and filed in this case, and prays the same may not be ratified by the Chancellor, except as to the amount awarded to *Henry A. Pierson* and *Eleanor*, his wife, to wit, the sum of \$112.64; to that extent he is willing that the report and statement be ratified for the following reasons and causes:

1. Because the said *William Edmonds* and *Rebecca*, his wife, *Priscilla Waring* and *Deborah Waring* were co-defendants with this exceptant, and they therefore cannot recover in this proceeding.

2. Because these parties should have been complainants to enable them to recover against this exceptant.

3. Because this exceptant has had no opportunity of defending himself against the claim of these co-defendants.

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4. Because their claim is barred by the statute of limitations which he pleads now to the same, and he pleads the statute of limitations to each and every one of the claims of the said *William Edmonds* and *Rebecca*, his wife, of *Priscilla Waring* and *Deborah Waring*, respectively, as allowed and reported against this exceptant in account B, by the auditor.

5. Because the whole proceeding is irregular.

6. Because the allegations and averments in the original and amended bills of complaint are insufficient to entitle the said parties and co-defendants with this exceptant to recover against him.

On the 15th day of April 1842, the parties filed the following agreement:

“We, the undersigned, solicitors for our respective clients, consent and hereby agree, that the auditor’s account and report marked A, and filed in this cause, shall be ratified and confirmed by the court at once; and also agree and consent that a decree may be passed, ordering and directing that a deed in fee simple, executed and acknowledged according to law, shall be given by *Henry A. Pierson* and *Eleanor*, his wife, *William Edmonds* and *Rebecca*, his wife, *Deborah Waring* and *Priscilla Waring* to *John T. Berry*, for the land and real estate mentioned in the proceedings, upon the payment to them of the sum of \$1,231.90, with interest, in the manner and proportions as stated in the auditor’s account A aforesaid.

This agreement is not to affect account B of the auditor, as to questions arising in reference to it between the parties to the above cause. But the said account B, with the exceptions thereto, are submitted to the Chancellor for decision according to the usual principles.”

On the 18th of April 1842, the Chancellor (BLAND,) decreed, that the auditor’s report, filed on the 8th of March last, be ratified and confirmed, and that the exceptions thereto filed, be and the same are hereby overruled. And it is further adjudged, ordered and decreed, that the defendant *John T. Berry* forthwith pay, or bring into this court to be paid, unto the complainants the sum of, &c., and unto the defendants *William*

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*Edmonds* and *Rebecca*, his wife, the sum of, &c., and unto the defendant *Deborah Waring*, the sum of, &c., and unto the defendant *Priscilla Waring*, the sum of, &c., and that on payment of the aforesaid sums of money, with interest as aforesaid, or bringing the same into court, *John B. Brooke*, of *Prince George's* county, shall be and hereby is appointed trustee, with power and authority, for and in the name of the complainants and the defendants *William Edmonds* and *Rebecca*, his wife, *Deborah Waring* and *Priscilla Waring*, to convey unto the defendant *John T. Berry* and his heirs, by a good and sufficient deed, &c.

And it is further adjudged, ordered and decreed, that the defendant *John E. Berry* forthwith pay, or bring into this court to be paid, unto the complainants, the sum of \$112.64 $\frac{3}{4}$ , with interest thereon from the 8th day of March last, and unto the defendants *William Edmonds* and *Rebecca*, his wife, the sum \$439.67 $\frac{3}{4}$ , with interest thereon from the 8th day of March last, and unto the defendant *Priscilla Waring*, the sum of \$396.75 $\frac{3}{4}$ , with interest thereon from the 8th day of March last, and unto the defendant *Deborah Waring*, the sum of \$439.67 $\frac{3}{4}$ , with interest thereon from the 8th day of March last. And it is further adjudged, ordered and decreed, that the defendants *John T. Berry* and *John E. Berry* pay to the complainants their costs of suit, to be taxed by the register.

From this decree, *John E. Berry* appealed to this court.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS and SPENCE, J.

By C. C. MAGRUDER and PRATT for the appellants, and  
By ALEXANDER for the appellee.

ARCHER, J., delivered the opinion of this court.

Exceptions, in pursuance of the act of 1832, ch. 302, have been taken to the sufficiency of the averments in the bill, to charge *John E. Berry*, the present appellant, with the sum decreed against him.



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The questions, therefore, which have been raised in this court against the sufficiency of the bill, are open for our consideration.

The bill and its amendment have been filed manifestly with the design of compelling the specific execution of a contract, in obtaining from *John T. Berry* the balance of the purchase money due from him for the purchase of a tract of land from *Benjamin Berry*. There is not only no allegation, but no intimation in the bill that any of the purchase money has come into the hands of *John E. Berry*, either as executor of *Benjamin Berry* or otherwise, and therefore no foundation whatever furnished for any decree against him for any portion of the purchase money. Whatever may be the proof, no decree, but upon proper and corresponding allegations, can be passed. The adherence to this familiar principle is necessary to prevent surprise and consequent injustice. The decree must therefore, upon this ground, be necessarily reversed.

That upon proper allegations, which the facts of the case would have justified, the Court of Chancery would have had jurisdiction to have decreed the payment over to the parties entitled, their proportion of the purchase money, we entertain no doubt. The right to the purchase money is claimed by *John E. Berry*, as residuary legatee of *Benjamin Berry*, and it was proper, therefore, that he should be a party to the controversy, that full and complete justice might be administered to all the parties interested. It was necessary for the safety of the vendee, who was about to be compelled to pay the purchase money, that all the contested rights to the purchase money should be adjusted.

We apprehend there is sufficient proof in the record of the receipt of the sum of money, part of the purchase money, by *John E. Berry*, which is stated in account B. His answer admits the receipt of large sums of money, which he asserts belongs to him as residuary legatee of *Benjamin Berry*, and in account A, it is stated, that there was paid to *John E. Berry*, one of the executors of *Benjamin Berry*, as per receipt, filed 16th August 1829, the sum of \$791.92. The ratification of

this account was had by consent of *John E. Berry* and the other parties to the case, which, we apprehend, constituted sufficient evidence of the receipt of the money.

To the ratification of account B, *John E. Berry* has excepted, and among other reasons, that the claim against him is barred by limitations. It is no objection to this defence, that it was not taken in the answer, because, as we have seen, the bill gave him no intimation that any claim would be made against him, by any allegation contained therein, and the defence was taken as soon, as by the proceedings he had notice that any claim was to be made against him.

Limitations, however, it is said, constitutes no defence. The money was received in 1829, and the bill was filed in 1835. Thus a period of six years had elapsed from the receipt by *John E. Berry*, of the purchase money with which he is attempted to be charged and the filing of the bill. The lapse of such a period, as would bar at law, an action for money had and received, would, by analogy, bar this claim in equity. It is true that *John E. Berry*, in the receipt of this money, might be considered as a *quasi* trustee, and as having received it for the use of those to whom it belonged, but he was not acting under a continuing or express trust, but his duty was to pay it over immediately on its receipt, and an action at law might have been maintained for its recovery; the statute ought therefore to be considered as running from the time of the receipt of the money.

The rights acquired to this purchase money were by assignment, and not by last will and testament. The admission of the parties is, that the devise of the land was, with the view of confirming the claim under the assignment. The claim, therefore, does not partake of the character of a legacy, so that limitations would not attach. Limitations, then, in our view, being a bar to the claim against *John E. Berry*, and such defence having been interposed, we deem it fruitless to remand the cause to the Court of Chancery for further proceedings.

So far, therefore, as the decree affects the appellant, (except, in so far as the same was passed by consent,) it is *reversed*.

State vs. Carleton et al.—1843.

THE STATE OF MARYLAND vs. JOHN M. CARLETON, SAMUEL M. SEMMES AND JOHN P. CARLETON.—December 1843.

Where the condition of a collector's bond was that he "shall well and truly account for and pay over to the treasurer of the State, the several sums of money which he shall receive or be answerable for by law, *at such time as the law shall direct,*" it is no change or alteration of the terms of the contract, that the legislature appointed a more distant day, than the one fixed when the bond was executed, for the payment of the money collected into the treasury.

The granting of indulgence by law to a principal collector of the State does not discharge his sureties, though without their consent.

The legislature, at their pleasure, and whenever the interest or convenience of the State requires it, may alter the time at which the collectors of taxes are required to pay the public dues into the treasury.

Where, on a collector's bond, the breach assigned by the State was the non-payment into the Treasury of the taxes received, and the defendants pleaded general performance by the collector, and no assessment imposed by the commissioners of the county, on which pleas issues were joined, and the jury found that the defendants did not owe the State any sum, as the State hath within by its pleadings alleged. **HELD:** that the verdict was defective in not finding the matters put in issue by the pleadings, and no judgment could be entered upon it.

APPEAL from *Allegany* County Court.

This was an action of *Debt*, commenced by the State on the 26th September 1843.

The State of *Maryland*, at the time of prosecuting its writ of *capias ad respondendum*, filed in court the following account, notices and collector's bond, to wit:

DR. *John M. Carleton, collector of Allegany county, in account with the State of Maryland.*

For the Direct Tax for 1841, \$8,017 12

CR. By cash, &c., as of 1st

Sept. 1843, \$6,150 00

By his allowance for

insolvencies 431 81

6,581 81

\$1,435 31

Interest on 1,435.31, from 1st Sept. 1843.

J. S. OWENS, *Treas. W. S. Md.*

22nd September 1843.



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State vs. Carleton et al.—1843.

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*To John M. Carleton, Esq., Collector of the State Tax:*

SIR,—Above you are furnished with a claim of the *State of Maryland* against you, which you have withheld more than three months after the same is due. You are hereby notified that the account of the said *State* against you, of which the above is a true copy, stated and signed by the treasurer of the *Western Shore of Maryland*, has been filed in the office of the clerk of *Allegany* county court, and that I shall make a motion for judgment against you on the said claim at the next term of said county court, to be begun and held at *Cumberland*, on the second Monday of October, next after the date of this notice.

HANSON B. PIGMAN,

*Deputy Attorney General, in and for Allegany county, Md. Cumberland, September 26th, 1842.*

DR. *John M. Carleton, collector of Allegany county, in account with the State of Maryland.*

For the Direct Tax for 1841,                      \$8,017 12

CR. By cash, &c., as of 1st

Sept. 1843,                      \$6,150 00

By his allowance for

insolvencies,                      431 81

6,581 81

\$1,435 31

For interest on \$1,435.31, from 1st Sept. 1843.

J. S. OWENS, *Treas. W. S. Md.*

22nd September 1843.

*To Samuel M. Semmes and James P. Carleton, Esq'rs:*

SIRS,—Above you are furnished with a claim of the *State of Maryland* against *John M. Carleton, esq.*, collector of the State tax, whose sureties you are, which he has withheld more than three months after the same is due. You are hereby notified that the account of the said *State* against him, of which the above is a true copy, stated and signed by the treasurer of the *Western Shore of Maryland*, has been filed in the office of the clerk of *Allegany* county court, and that I shall move for a judgment against the said *John M. Carleton* and you his sureties, on the said claim at the next term of *Allegany* county

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State vs. Carleton et al.—1843.

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court, to be begun and held at *Cumberland*, on the second Monday of October, next after the date of this notice.

HANSON B. PIGMAN,

*Deputy Attorney General, in and for Allegany county, Md. Cumberland, September 26th, 1843.*

*Know all men by these presents, That we, John M. Carleton, James P. Carleton and Samuel M. Semmes, are held and firmly bound unto the State of Maryland in the just and full sum of twenty thousand dollars, to be paid to the said State of Maryland, or its certain attorney, to the payment whereof well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 20th day of December, in the year eighteen hundred and forty-one. Whereas, the above bound John M. Carleton has been appointed by "the commissioners of Allegany county," collector of the tax under the act of the General Assembly of Maryland, passed at an extra session begun and held at Annapolis on Wednesday the 24th day of March 1841, and ended on Wednesday the 7th day of April 1841, chapter twenty-three.*

Now the condition of the above obligation is such, that if the above bounden *John M. Carleton*, appointed collector as aforesaid, shall well and faithfully execute his office as such collector, and the several duties required of him by law, and shall well and truly account for, and pay over to the Treasurer for the *Western Shore of the State of Maryland*, the several sums of money which he shall receive or be answerable for by law, at such time as the law shall direct, then the above obligation to be void, else to remain in full force and virtue.

JNO. M. CARLETON, (Seal.)

SAMUEL M. SEMMES, (Seal.)

JAMES P. CARLETON, (Seal.)

Signed, sealed and delivered in the presence of *Geo. W. Devecmon, Wm. Conrad.*

MARYLAND, Ss. Be it remembered, that on this 20th day of December 1841, personally appears *George W. Devecmon*

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and *William Conrad*, subscribing witnesses to the above bond, before me the subscriber one of the justices of the peace in and for *Allegany* county and State aforesaid, and severally made oath on the Holy Evangely of Almighty God, that they did see *John M. Carleton*, *James P. Carleton* and *Samuel M. Semmes*, obligors in the above bond, sign, seal and acknowledge the same as their act and deed, and the said *George W. Devecmon* and *William Conrad* did subscribe their names as witnesses thereto. Sworn before

JACOB FECHTY, (Seal.)

On the back of the foregoing bond it is thus endorsed, to wit, "Dec. 22nd, 1841,—Bond approved by commissioners.

Test,

GEO. W. DEVECMON, Clerk."

True copy, Test: *Jno. M. Carleton*, Clerk to the commissioners of *Allegany* county. *September 26th*, 1843.

The declaration, after setting forth the bond and its condition, assigned for breach thereof, that the said *John M. Carleton*, in the said writing obligatory mentioned, did not, from the making of the same, well and faithfully execute the said office of collector of the tax, and did not well and truly pay all sums of money received by him, and did not in respect thereto well and truly execute and perform the several duties required of him by the laws of this State. By means of which said several premises the said *State* hath sustained damage to a large amount, to wit, the sum of two thousand dollars, current money, and thereby an action hath accrued to it to demand and have of and from the said defendants the sum of twenty thousand dollars, current money, to wit, at the county aforesaid, above demanded; yet the said defendants although often requested, have not paid the said sum of, &c.

A copy of the account and notices were made and sent with the said writ to the sheriff of the county aforesaid, thereon endorsed, to be served on the defendants with the writ, for plea or judgment the first term. Which were duly returned served.

*John M. Carleton*, the collector, after oyer, pleaded:

1st. General performance.



2nd. That the commissioners of *Alleghany* county did not immediately, or at any other time before or after the correction, adjustment and confirmation of the valuations directed to be returned to them under the act of the General Assembly of this State, entitled “an act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State,” passed at the March session, 1841, chapter 23, impose an assessment or tax of twenty cents or one-fifth of one per cent. in every hundred dollars worth of assessable property within their jurisdiction, (and that they did not impose any assessment or tax whatsoever on the assessable property within their jurisdiction, under and by virtue of the said last mentioned act of Assembly as they were required to do, and which should have been done before the said *John M. Carleton* was by law authorised to collect any such assessment or tax, to wit, on the 1st April 1843,) to wit, at the county aforesaid, and this he is ready to verify; wherefore, &c.

*Samuel M. Semmes* and *James P. Carleton* after oyer, pleaded:

1st. General performance by *John M. Carleton*.

2nd. That they entered into and became parties to the said writing obligatory, as sureties for the said *John M. Carleton*, and that the said plaintiff, by an act of its General Assembly, passed December session 1841, ch. 116, entitled, a supplement to the act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State, passed at March session 1841, ch. 23; and also by a further act of the said General Assembly, passed December session 1842, ch. 269, entitled, an act further supplementary to an act, entitled, an act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State, passed March session 1841, ch. 23, extended the time for the payment into the treasury of said State, of the taxes collectable in *Alleghany* county for the year 1841, under the act, entitled, an act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State, being the taxes within the purview of the said writing obligatory, and otherwise gave indulgence to the

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said *John M. Carleton*, without the privity or consent of the said *Samuel M. Semmes* and *James P. Carleton*, to wit, at, &c., and this they are ready to verify; wherefore they pray, &c.

3rd. That the said plaintiff ought not to have and maintain its action aforesaid against them, because they say, that the commissioners of *Allegany* county did not immediately, or at any other time before or after the correction, adjustment and confirmation of the valuations directed to be returned to them under the act of the General Assembly of this State, entitled, an act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State, passed at the March session 1841, ch. 23, impose an assessment or tax of twenty cents or one-fifth of one per cent. in every hundred dollars worth of assessable property within their jurisdiction, (and that they did not impose any assessment or tax whatsoever on the assessable property within their jurisdiction, under and by virtue of the said last mentioned Act of Assembly, as they were required to do, and which should have been done before the said *John M. Carleton* was by law authorised to collect any such assessment or tax, to wit, on the 1st day of April 1843,) to wit, at, &c., and this they are ready to verify; wherefore they pray, &c.

The State replied to the plea of the said *John M. Carleton*, first, (separately) above pleaded, that he the said *John M. Carleton* hath not, from the time of making the said writing obligatory aforesaid, hitherto well and faithfully observed, performed, fulfilled and kept, all and singular, the matters and things in the condition of the said writing obligatory mentioned and contained, which he, according to the condition thereof, ought to have observed, performed, fulfilled and kept, to wit, at the county aforesaid, and of this the said State puts herself upon the country, &c.

And as to the second plea of the said defendant *John M. Carleton*, by him secondly (separately) above pleaded, the said State says, that the said plaintiff, its aforesaid action against him the said defendant, *John M. Carleton*, to have and maintain ought, because the said State says, that the commissioners

of *Allegany* county did, immediately after the correction, adjustment and confirmation of the valuations directed to be returned to them under the act of the General Assembly of this State, entitled, an act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State, passed at the March session 1841, ch. 23, impose an assessment or tax of twenty cents or one-fifth of one per centum in every hundred dollars worth of assessable property within its jurisdiction, to wit, at the county aforesaid, and of this the said State puts herself upon the country, &c.

And the said State, as to the said *first* plea of the said defendants *Samuel M. Semmes* and *James P. Carleton*, by them first above pleaded, says, that the said *John M. Carleton*, in the condition of the said writing obligatory mentioned, hath not, from the time of making the writing obligatory aforesaid, hitherto well and faithfully observed, performed, fulfilled and kept, all and singular, the matters and things in the condition of the said writing obligatory mentioned and contained, which he, according to the condition thereof, ought to have observed, performed, fulfilled and kept, to wit, at the county aforesaid, and of this the said State puts herself upon the country, &c.

The State demurred generally to the *second* plea of S. M. S. and J. P. C.

And as to the *third* plea of the said defendants S. M. S. and J. P. C., the said State says, that the said commissioners of *Allegany* county did, immediately after the correction, adjustment and confirmation of the valuations directed to be returned to them under the act of the General Assembly of this State, entitled, an act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State, passed at the March session 1841, ch. 23, impose an assessment or tax of twenty cents or one-fifth of one per centum in every hundred dollars worth of assessable property within their jurisdiction, to wit, at the county aforesaid, and of this the said State puts herself upon the country, &c.

The county court rendered judgment on the demurrer to the *second* plea for the defendants S. M. S. and J. P. C., and that



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the said *State of Maryland* take nothing by her writ and declaration aforesaid, and the said *Samuel M. Semmes* and *James P. Carleton* go thereof without day.

A jury was then sworn, who found a verdict, that the said *John M. Carleton*, *Samuel M. Semmes* and *James P. Carleton* do not owe the said *State of Maryland* the sum of \$20,000, or any part thereof, in manner and form as the said *State of Maryland* hath within by her pleading alleged.

At the trial it was agreed that all errors in pleading be and they are hereby released, it being the wish of said counsel to try the merits alone of the questions involved.

The verdict and judgment being for the defendants, the State prosecuted this appeal.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS and SPENCE, J.

By HANSON B. PIGMAN, Deputy Attorney General for the State, who contended—

1. That the State, the plaintiff, was authorised by the terms of the bond of the said *John M. Carleton* and sureties, to change the days of payment of the taxes into the treasury, as she thought fit.

2. If she was not so authorised, the acts of 1841, ch. 116, and 1842, ch. 269, cannot in any wise be viewed as *contracts*, giving time to the principal, or any otherwise binding upon the State, so as to discharge the surety.

3. That the fact of giving time by the creditor to the principal by which a surety is discharged, is not pleadable *at law* in the *State of Maryland*.

4. That the principle of giving time to a principal, so as to release a surety, is not applicable between a sovereign State and an individual.

5. The court below, the appellant maintains, also committed error in this, that they proceeded to try and did try issues in fact, after giving judgment for the defendants, upon a demurrer which went to the gist of the action.

By G. A. PEARRE for the appellee, who maintained—

1. That by the acts of the General Assembly of 1841, chap. 116, and 1842, chap. 269, the plaintiff extended the time of payment into the treasury by the collector, and gave day of payment without the knowledge and consent of the sureties, and thus released them.

2. That the defence in the second plea of the defendants, *James P. Carleton* and *Samuel M. Semmes*, is good and pleadable at law.

3. That the defence is also good, as against the State, as well as against an individual.

STEPHEN, J., delivered the opinion of this court.

The principal question involved in this case is an important one, although, according to our views, the merits of it lie within a very narrow compass. It is an action upon the collector's bond of *Allegany* county, and his two sureties, given to secure the faithful performance of the duties of the office of collector of the direct tax of that county. The action was a joint one against the principal and his sureties; and the sureties pleaded that time had been given by law, without their consent, to their principal, for the payment of the taxes into the treasury, by which extension of time they were discharged by law from all responsibility under or by virtue of their said bond. To this plea there was a demurrer, and the court below overruled the demurrer, and gave final judgment against the State, and in favor of the two sureties. The court then proceeded to try the issues in fact, and upon the finding of the jury, that nothing was due to the State, gave likewise a final judgment in favor of all the defendants upon such verdict. We think there was error in the judgment of the court below, and that the same ought to be reversed.

The condition of the bond is, that the principal shall well and truly account for and pay over to the treasurer the several sums of money which he shall receive or be answerable for by law, "at such time as the law shall direct." The extension of the time of payment therefore by the legislature was no change

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or alteration of the terms of the contract, but was warranted and authorised by the express language of the condition of the bond upon which the suit was instituted. The principle, therefore, that time given to the principal debtor by the creditor, without the consent of the sureties, will operate their discharge, cannot be applied to this case. The terms of the condition of the bond, reserved to the State a right to grant the indulgence by law, if she thought fit to do so, without affecting in any manner the liability of the sureties. But it is not necessary to rely upon the condition of the bond alone for the reversal of the judgment of the court below. A similar question was brought before the Court of Appeals for the Eastern Shore from *Worcester* county several years ago, and the court then decided, that the granting of indulgence by law to the principal collector, did not operate to discharge his sureties. The law was not considered as binding or obligatory upon the State, but alterable by the legislature, at their pleasure, whenever the interest or convenience of the State might require it.

We therefore think that there was error in the judgment of the court below, rendered upon the demurrer to the second plea of the sureties, in which they rely as a defence to the action upon the extension of time granted to their principal by law, without their privity or consent, for the payment of the taxes into the treasury; such defence being legally insufficient and untenable. The demurrer should have been ruled good, and judgment given thereon for the plaintiff. After refusing to sustain the demurrer of the plaintiff to the second plea of the sureties, founded upon the indulgence granted to the principal, the court proceeded to try the issues in fact, and for that purpose ordered a jury to be sworn. Those issues were made up from pleas pleaded separately by the principal, and jointly by the sureties. Those pleas were performance, and that no tax was imposed by the commissioners of *Allegany* county, according to law. The State replied generally, that the principal had not performed the duties imposed upon him by the condition of his bond, and that the tax had been imposed by the commissioners according to law. No breaches were as-



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signed conformably to the provisions of the statute of 8 and 9 *William 3rd*, upon that subject. The jury, by their verdict, found that nothing was due from the defendants to the plaintiff, and upon that verdict, judgment was given by the court below in favor of the defendants. In rendering such judgment, there was, we think, manifest error, because the matters put in issue by the pleadings were not found by the jury, and the verdict being therefore defective in point of law, no judgment could legally be entered upon it.

Upon the subject of interest, we think that no difficulty can exist. The extension of time by law being warranted and sanctioned by the terms of the condition of the bond, and being in no wise binding or obligatory on the State, there was not such a variation of the terms of their contract, in reference to the subject of interest, as could operate to discharge the sureties, or affect, in any manner, their liability. We are, therefore, of opinion, that the judgment of the court below ought to be reversed, and a procedendo ordered.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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SAMUEL McARTHUR vs. J. A. MARTIN AND JOHN McDERMOTT,  
SPECIAL BAIL OF DAVID C. MARTIN.—*December 1843.*

Upon a *scire facias* against special bail, where the defendant did not plead to the writ, but moved the court to enter an *exoneretur*, which being done, the plaintiff thereupon appealed. This court dismissed the appeal, there being no final judgment in the cause.

APPEAL from *Frederick County Court*.

On the 7th December 1841, *Samuel McArthur* sued out a *scire facias* against the appellees, which recited a judgment rendered in his favor, against *D. C. Martin* at February term 1840, of *Frederick county court*. The bail appeared and suggested on the record, that their principal "has applied in due form of law for the benefit of the bankrupt laws of the *United States*, and that he made his application on the 2nd March

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1842." The court ruled the plaintiff to show cause on or before the 8th March 1842, why an *exoneretur* should not be entered, provided notice of the rule be served on the plaintiff on or before the 4th March. On the 3rd March, the commissioner under the bankrupt law for *Frederick* county, made oath, that *D. C. M.* had applied in due form for a release, &c. The notice of the rule was served on the appellant's attorney, and the docket entries of the District Court of the *United States*, which showed an order for the hearing of the application on the 31st March 1842, were filed in the cause duly certified. On the 8th March, the appellant showed cause against the rule, but the county court made the rule absolute, and ordered the *exoneretur* to be entered. The plaintiff appealed.

The cause was argued before STEPHEN, ARCHER, CHAMBERS and SPENCE, J.

By PALMER for the appellant, and

By BREngle for the appellee.

BY THE COURT—

APPEAL DISMISSED.

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JOHN F. CONOLLY *vs.* KETTLEWELL & WILSON.—*Dec.* 1843.

It is the province of the jury to decide all questions of fact of which evidence legally sufficient for that purpose is laid before them, and it is equally the right and duty of the court to decide all questions of law arising upon the facts, when found and ascertained by the jury.

The plaintiff proved that all the articles mentioned in his account, were *selected* by S, and that he *refused to deliver* them until he saw the defendant. He then asked the defendant, "will you pay for the goods if *delivered* to S, and he did not?" Defendant answered, if S did not pay, he would. The goods were then entered on the plaintiff's books, "*secured by*" defendant. Under such circumstances, the defendant cannot require the court to say to the jury, "that the promise to see the plaintiff paid, if S did not pay, not being in writing, is void by the statute of frauds, and plaintiff cannot recover," as it took from the jury the right of finding the truth of the facts of which evidence had been offered.

In effect, the proof in the case, if believed by the jury, subjected the defendant to separate and secondary, and not an original or a joint responsibility.

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Where the plaintiff below obtained a verdict, and the defendant brought the cause before this court on exceptions, and it appeared that the contract relied on and proved, was void under the statute of frauds, being a collateral, and not an original undertaking. After a reversal of the judgment, the plaintiff's motion for a procedendo was overruled.

APPEAL from *Baltimore County Court*.

This was an action of *Assumpsit*, brought by the appellees against the appellant, on the 16th May 1840, for goods sold and delivered. The defendant pleaded non-assumpsit and limitations, on which issues were joined.

1ST EXCEPTION. The plaintiff, to support the issue on his part, proved by *John Higinbotham*, that he was the clerk of the plaintiff in 1836 and 1837, and at the time when the articles charged in the account of the plaintiff, as following, were sold and delivered.

“MR. JAMES STERLING, secured by *John F. Conolly*,  
*Bought of Kettlewell, Wilson & Hillard.*

1837, Feb. 13. 1 bb'l 1st quality sugar, bb'l 25c. 237 lb. at 10 c. \$23.95, &c. Amounting in the whole to \$624.16.”

That all the articles in said account were selected by *James Sterling* and by one of the plaintiffs; entered in the day-book of plaintiffs to *James Sterling*, as follows: “*Mr. James Sterling, bought of Kettlewell, Wilson & Hillard.*” But the goods therein contained were not delivered by the plaintiffs, and the plaintiffs refused to deliver them to *Sterling* until they saw the defendant. That plaintiff then asked *Conolly*, will you pay for these goods if delivered to *Sterling*, and if *Sterling* did not. That *Conolly* answered the plaintiffs, that if *Sterling* did not pay the amount of the goods, he would pay; and that afterwards, on the books of the plaintiff, in the account of *Sterling*, the following words were written, “*secured by John F. Conolly,*” by the plaintiffs, and the goods were, after said promise, delivered by the plaintiffs to *Sterling*; and further proved, that the said *Sterling* had previously applied to purchase goods from the plaintiffs on his own credit, and had been refused. Whereupon the defendant moved the court to give the following instruction:



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“That in this case the promise to see the plaintiffs paid, if *Sterling* did not pay, not being in writing, is void by the statute of frauds, and plaintiff cannot recover.” Which instruction the court (ARCHER, C. J., and PURVIANCE, A. J.,) refused to give. The defendant excepted.

2ND EXCEPTION. The plaintiff having offered the evidence in the preceding exception, and which is made part of this, the defendant further prayed the court to instruct the jury as follows, to wit: “That there is no evidence in this cause to shew that there was a joint responsibility of *Sterling* and *Conolly* for the sale and delivery of the goods to *Sterling*, now sought to be recovered.” Which instruction the court refused to give. The defendant excepted.

The cause was argued before STEPHEN, DORSEY, and SPENCE, J.

By RICHARDSON, D. A. G., for the appellants, and  
By McMAHON for the appellees.

STEPHEN, J., delivered the opinion of this court.

We think the court were clearly right, in refusing to grant the defendant's first prayer, made in this case. It was an action founded upon a collateral promise to pay the debt of another person, to whom goods were delivered by the plaintiffs. The prayer to the court was to instruct the jury, that the promise of the defendant to see the plaintiffs paid, if the principal debtor did not pay, not being in writing, was void by the statute of frauds, and the plaintiff, therefore, could not recover. It is the province of the jury to decide all questions of fact, of which evidence legally sufficient for that purpose is laid before them; and it is equally the right and duty of the court to decide all questions of law, arising upon the facts, when found and ascertained by the jury. The granting of the prayer made by the defendant of this case, would have violated this well established principle in law, defining the jurisdiction of the court and the jury in the administration of civil justice. The court were called upon to assume the existence of facts

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which it was the exclusive province of the jury to find. The prayer assumes the truth of the facts of which evidence had been given, without submitting the verity thereof to the finding of the jury. To have granted such a prayer, would have been an unwarrantable encroachment upon the province of the jury, and it was therefore properly refused by the court.

We think there was error in the refusal of the court below to grant the defendant's second prayer. The undertaking of the defendant, according to the proof in the cause, clearly subjected him to a separate and secondary, and not an original or joint responsibility. The contract was to pay, if the person to whom the goods were delivered did not. The goods were charged to him in the day-book of the plaintiffs, and the plaintiffs refused to deliver them until they saw the defendant. When they saw the defendant, they asked him if he would pay for the goods, if the party to whom they were to be delivered, did not pay. And it is proved, that his undertaking was expressly a conditional one to pay, if the person to whom the goods were delivered, did not pay. That this was a collateral and not an original undertaking, is clearly established by the case of *Elder vs. Warfield*, to be found in 7 *Harr. & John. Rep.* 391, where this court say, "where there is no previously existing debt or other liability, but the promise of one, is the inducement to, and ground of, the credit given to another, by which a debt or liability is created in him to whom the credit is given, such a promise is a collateral undertaking. The general rule being, that wherever the party undertaken for, is originally liable upon the same contract, the promise to answer for that liability is a collateral promise, and must be in writing, as if B gives credit to C, for goods sold and delivered to him, or the promise of A to see him paid, or to pay him for them if C should not, in that case it is the immediate debt of C, for which an action will lie against him, and the promise of A is a collateral undertaking to pay that debt, he being only as a security. This case is not distinguishable in principle from the one here put, as an example or illustration of the nature and character of a collateral liability; and we think that the

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court below erred in refusing to grant the defendant's second prayer; that there was no evidence of a joint responsibility of *Sterling and Conolly*, for the payment of the goods sold and delivered to *Sterling*, *Conolly* was manifestly a security only, and not originally and jointly liable with *Sterling*, for the price of the goods sold and delivered. JUDGMENT REVERSED.

Motion by appellee for a procedendo overruled.

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WILLIAM G. HARRISON vs. THE MAYOR AND CITY COUNCIL  
OF BALTIMORE.—December 1843.

The *Mayor and City Council of Baltimore* by their charter, have full power to pass all laws and ordinances necessary to preserve the health of the city, prevent and remove nuisances, and prevent the introduction of contagious diseases within the city, and within three miles of the same.

That act clothed the corporate authorities *within the specified limits*, with all the legislative power which the General Assembly could have exerted, and of the degree of necessity for such municipal legislation, the M. and C. C. of B. were the exclusive judges; the means and manner contributory to the end in view, were committed to their sound discretion.

The corporation might impose penalties, or cause the vessel and all persons on board to be taken possession of, and controlled until their disinfection was effected, and impose on the captain, owner or consignee, reimbursement of all expenses incurred, or they might adopt at the same time both those remedies.

Where testimony has been offered, legally sufficient to warrant the jury in finding certain facts enumerated in the plaintiff's prayer, which gave him a right of action, he may upon the hypothesis, that the jury believe the evidence in the cause, and the facts enumerated, require the court to instruct them that he is entitled to recover to the extent of such right.

In an action to recover the expenses incurred by the *Mayor and City Council of Baltimore*, in disinfecting and purifying a vessel, persons, and baggage, on board her at the time of her arrival, from the infection of the small pox, the defendant cannot require the court to instruct the jury, that the recovery must be limited to the amount of expenses absolutely necessary to preserve the health of the city, or to prevent the introduction of the small pox. By such an instruction the rights of the plaintiff would have been unreasonably and illegally restricted.

If the Health officer of the city, on whom the duty of disinfection is imposed by the ordinances of the corporation, in causing expenses to be incurred, acted *bona fide* within the limits of a sound discretion and with reasonable



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skill and judgment in this discharge of his official duties, the reasonable expenses thus incurred by him, must be paid by the captain, owner or consignee of the disinfected vessel as declared by the ordinances of the city on such subjects.

The Health officer in his disposition of persons on board of an infected ship, under the ordinances of the city, must send the persons laboring under the infectious disease to the hospital, and may also send those on board the same vessel, liable to be affected by it, to the hospital, if in his opinion such course be necessary to prevent the spread of the disease.

And that officer, acting with reasonable skill and judgment, and with a sound and honest discretion in relation to persons not apparently afflicted with the disease, renders the owner, master or consignee, also, liable for the reasonable expenses incurred as in other cases.

Where the county court undertakes of its own motion to add a qualification to a prayer granted at the request of a party, the qualification must be consistent with the original prayer, and not leave it doubtful or difficult to determine what was the scope or design of the entire instruction.

Upon motion of the defendant, the county court instructed the jury, "that if they find the expenses incurred and claimed in this action were not necessary to preserve the health of the city, and not necessary to prevent the introduction of the small pox by or through the instrumentality of the vessel, the persons, baggage or articles on board her," then the plaintiff cannot recover; and then added, "that the recovery must be limited to such amount of expenses as in the *opinion of the Health officer* was necessary to disinfect the vessel, cargo and passengers of said disease, and to prevent their propagating the same. **HELD:** that this was erroneous, because difficult to reconcile the two parts of the instruction so given, or to discover what was the instruction the court designed to give.

### APPEAL from *Baltimore County Court.*

This was an action of *assumpsit*, commenced on the 1st January 1841, in which the plaintiff, the appellees, averred that the defendant in this action on, &c., at, &c., was indebted to plaintiffs in a large sum of money, to wit, the sum of one thousand dollars, lawful money, for so much money by the plaintiffs before that time paid, laid out and expended for the defendant, as consignee of the ship *Ellen Brooks*, at his special instance and request; and being so indebted, &c.

The defendant pleaded *non-assumpsit*, on which plea the issue was made up.

At the trial of this cause, the plaintiff to support the issue on its part, offered in evidence and read to the jury ordinance No. 12, entitled an ordinance for the due performance of quar-

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antine at the port of *Baltimore*. The plaintiff further proved by *Dr. Martin*, that he was the health officer of the port of *Baltimore*, duly appointed in the year 1840, and at the time the *Ellen Brooks* arrived at *Baltimore*, and during all that year; that the ship *Ellen Brooks* arrived at the port of *Baltimore* about the 20th May 1840; that immediately on her arrival, and coming to at the quarantine ground, he the said *Dr. Martin*, as health officer, went on board the said *Ellen Brooks*, and there found a number of passengers, say about one hundred and eighty; that some of the passengers were then afflicted with the small pox, and some of them with typhus or jail fever, and that they continued to sicken after the arrival of the vessel almost daily, some with one disease, some with the other; that the passengers were most of them Irish emigrants, who were living almost entirely on potatoes; that he, the said *Dr. Martin*, directed the said vessel to remain at the quarantine ground, which is within the limits of the city of *Baltimore*, and that the persons on board of her should not land, or have any communication with the shore; that he, the said *Dr. Martin*, directed about twenty-four of the said passengers, being all of them who were sick, to be sent to the small pox hospital in the city of *Baltimore*, about one-half of whom, according to his recollection, when sent to the small pox hospital, were afflicted with the small pox disease, and one-half with the typhus fever; that he, the said *Dr. Martin*, considering that the passengers who remained on board the said vessel, ought to be furnished with fresh provisions, procured such provisions and supplied the said passengers with the same, by whom they were consumed; that the bill headed—

“*Ship Ellen Brooks, William G. Harrison, consignee, to the Mayor and City Council of Baltimore, Dr.*”

For the following articles furnished, and expenses incurred, in disinfecting and purifying said vessel, when at quarantine, in the months of May and June 1840, on her arrival from *Liverpool*, viz:

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1840, June 12,	Paid John Muckelroy for beef and vegetables,	- - -	\$35 14
" 14,	" Philip Fell, for provisions,	- - -	6 00
" "	" D. Graves & Son, for 100 herrings,	- - -	1 00
" "	" Mr. McAliston, for groceries,	- - -	9 00
" 15,	" for lime to whitewash ship,	- - -	1 75
" "	" cartage sundry times,	- - -	1 50
" "	" boat hire,	- - -	1 25
" "	" John McWilliams, his bill for provisions furnished ship,	- - -	11 76
" "	" hack hire going to and from hospital,	- - -	2 00
" "	" for brooms and brushes for ships use	- - -	1 00
" "	" Thos. Evans, for conveying passengers to the hospital,	- - -	24 00
" "	" Mr. Bruehl, for bread,	- - -	14 00
			<hr/>
			\$108 40

Sworn to by *Joseph Martin*, on this 30th day of November 1840, before me, *SAMUEL BRADY, Mayor.*

Received November 30th, 1840, of the commissioners of health, the amount of the above account in full.

*JOSEPH MARTIN.*

Shows the amount in full expended by him, in the purchase of the aforesaid provisions, as well as the other expenditures incurred by him in relation to the said vessel, and the time of payment of the said bill by him; that in the opinion and judgment of the said *Dr. Martin*, the said expenditures were necessary, reasonable and proper; and that it was necessary in his judgment and opinion, to the preservation of the health of the said passengers, who remained on board the said vessel, that they should be supplied with fresh provisions; that he considered it necessary to prevent the spread of the typhus fever among the said passengers; that they should be furnished with fresh provisions; that his object chiefly in furnishing these provisions, was to prevent the spread of the typhus fever; but that in his opinion and judgment there was still danger that the small pox might break out among the passengers left on



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board, after the removal of the persons who were sent as aforesaid, to the small pox hospital, and he considered it necessary to prevent the propagation of the small pox among the said passengers who remained on board the said vessel, to furnish them with fresh provisions, and that he would have furnished said supplies if there had been no typhus; that he, the said *Dr. Martin*, considered it his duty, as health officer, to send the aforesaid persons to the hospital, and to furnish those who remained on board the said vessel with fresh provisions; that supposing that the master of the vessel might furnish the said provisions at a less expense than he could, he directed the master of the *Ellen Brooks*, to furnish the passengers remaining on board the said vessel with fresh provisions before witness ordered said supplies; that the master refused to do so, saying that he had lost enough already; that he, in company with the Mayor, went to see defendant, believing him to be consignee, and on his way to defendant's counting room, he met the defendant on *Pratt* street in the city of *Baltimore*, and spoke to him of the necessity of furnishing fresh provisions for the said passengers; that he was then accompanied by *Shepard C. Leakin*, the then Mayor of the city of *Baltimore*; that the defendant then told him to furnish the necessary supplies, and that he would be responsible for them; that in this interview he explained to the defendant, that he was the health officer, and that the passengers were detained on board by his authority; that in this conversation he spoke to the defendant only in reference to the expenses he was incurring, and not in reference to the bill of the small pox hospital; that he, the said *Dr. Martin*, would have supplied the said provisions, with or without the consent of the defendant, or any one else, and that his object in calling on the defendant was, to let those interested know what he was doing, was necessary to be done, and that he considered it his duty, as health officer, to furnish these supplies, and that he called on the defendant to give him an opportunity to furnish the provisions, if he could do so at a cheaper rate than he, *Dr. Martin* could; that when he saw the defendant, nearly all the passengers who were sent to the

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small pox hospital, had been removed to that place; that the said *Dr. Martin* considered that the change in the provisions so made by him, as necessary to prevent the spread of the small pox among the passengers, remaining at that time on board the said vessel; that he directed that none of the passengers remaining on board the said vessel, should land; that in the opinion and judgment of the said *Dr. Martin*, while the said vessel remained at the quarantine ground, there was no danger, that the contagion of the small pox would be introduced into the city of *Baltimore*, unless some of the passengers went on shore, or had intercourse with persons from the shore; that he purchased lime, and with it white-washed the *Ellen Brooks*, and fumigated the vessel, and employed no disinfecting agents with respect to the clothes and other articles on board the said vessel, except soap and water and ventilation. Witness stated that he considered it necessary to send the typhus patients from on board the vessel, as the state of the ship very much increased their danger, and could send them no where else than to the hospital, without danger of communicating the small pox. The plaintiff further proved by one *Jones*, that he was a resident student, and had charge of the city contagion hospital in 1840; that the persons named in the bill headed—

“*Ship Ellen Brooks, to the City Contagion Hospital, Dr.*

To board, medical attention, medicines, nursing, washing, &c. &c., of the following persons, (vide *Dr. Martin's* order,) viz:

<i>Date of Adm'n.</i>	<i>Names.</i>	<i>Date of dis'ge.</i>	<i>No. days.</i>
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May 27,	Cornelius Simpson,	June 24,	29, &c.,
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enumerating 26 persons, and making in all 694 days, at \$1 per day, \$694. Approved, *S. C. Leakin*, Mayor.

J. H. MILLER, *Pres. of Faculty.*”

Received payment of the commissioners of health, as per receipt books. *August 26th*, 1840. JOEL JONES.

I do hereby certify, that the individuals named in this bill were sent by me to the small pox hospital, were sent from the ship *Ellen Brooks*, as necessary to the purification of said ship.

*August 25th*, 1840. JOS. MARTIN, *Health Officer.*

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Were received in that hospital according to contract made with the city of *Baltimore* to receive all patients sent there by the city, and that they were received in consequence of an order from *Dr. Martin*, the health officer; that about two-thirds of them had small pox, one case of syphilus, who after arriving at the hospital was attacked with small pox, and the rest had typhus fever; that they were kept at the hospital during the periods mentioned in the said paper, and that the cost of each day for each patient, charged by the small pox hospital, was \$1.00 for board, medical treatment, &c.; that the *Hibernian Society* furnished them with clothes; that after receiving an order from *Dr. Martin*, and on the 2nd or 3rd June, he waited on the captain of the vessel who referred him to the defendant, who when applied to, said that the bill of the small pox hospital would be paid, or that he would see it paid, and in this interview the defendant requested the witness to send the patients out of the hospital as speedily as possible and not to keep them there unnecessarily; that about two weeks afterwards, and before the said persons had been removed from the hospital, he again called on defendant, who said that he has made some arrangement with *Captain Conkling*, who had made an agreement with him to refer to arbitration the question as to who was responsible for the said bill, and that the patients in the hospital were discharged as soon as they could with safety be, and that the charges in the said bill are usual and customary. The plaintiff further proved, that the mayor and city council of *Baltimore* paid, before the bringing of this suit, the amounts of *Dr. Martin's* bill, and that of the small pox hospital. The defendant then offered in evidence the charter party entered into in *Liverpool*, and in pursuance of which the voyage from that port to *Baltimore* was performed, and the said passengers who were removed to the small pox hospital were transported.

The charter party stipulated, that the vessel "with all convenient speed be made ready, and receive and take on board a full cargo of lawful goods and merchandize, such cargo not to exceed six hundred tons weight, and of which not more than



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four hundred tons dead weight articles, with such passengers as may offer, *all expenses on the same being paid by the charterers,*" &c.; "and being so loaded shall therewith proceed to *Baltimore*, or so near thereunto as she may safely get, and deliver the same, &c., and so end the voyage," &c. The execution of which was admitted.

The plaintiff further proved by *Jones*, that in his opinion as a physician, the disease of small pox may break out after it is imbibed in six days, and may not until fourteen, and that the average is nine days, and that it may last in the constitution of the patient two months. The defendant further proved by *William H. Conkling*, that upon the arrival of the *Ellen Brooks* at *Baltimore* he entered that portion of the cargo of the said vessel which consisted of salt, and which belonged to and was shipped on board the said vessel at *Liverpool* by *Ingleby & Browne*, the charterers; that this portion of the cargo was consigned to order, and the bills of lading for it had been sent to the said *William H. Conkling* by a *Mr. Baldwin* of *Philadelphia*, to whom *Ingleby & Browne* had transmitted them, the said *Conkling* deriving all his authority to act from *Baldwin*; that when he applied to have the salt landed the captain of the vessel refused to suffer it to be landed until he was secured the full amount of his freight; that he, the said *William H. Conkling*, at the request of the master and the defendant, undertook to collect the freight payable by the consignees of the other portions of the cargo; did in fact collect it, and paid to the defendant the entire freight under the charter party; that he had no other connexion with the vessel or cargo than as above stated.

Upon cross examination the said *William H. Conkling* stated, that before the *Ellen Brooks* arrived at *Baltimore*, he heard the defendant say, that he would want to sell or freight her upon her arrival, and that he had acted on former occasions as the agent in *Baltimore* of *Mr. Sheppard* of *New Orleans*, the owner of the *Ellen Brooks*, and had been the consignee on former voyages of that vessel, and that he acted as consignee of the vessel when she was in *Baltimore* at the time of incurring these expenses. The defendant further proved, that the *Ellen*

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*Brooks* is an *American* vessel, owned by *Mr. Sheppard* of *New Orleans*, and was entered at the custom house at the port of *Baltimore*, upon the oath of the master of the vessel, as to the character of the vessel. The defendant also read to the jury ordinance No. 11, entitled "An ordinance to preserve the health of the city of *Baltimore*." The plaintiff then offered the two following prayers and instructions to the jury:

1. If the jury believe from the evidence in the cause, that the ship *Ellen Brooks* came to at the quarantine ground of the port of *Baltimore*, with persons on board afflicted with the small pox, or varioloid or both diseases, at the time spoken of in the testimony, and that the expenses charged in the several bills referred to in the testimony, were incurred in the process of disinfecting the said ship, and in the measures directed to be taken in reference to the officers, crew and passengers, to disinfect them, and to prevent their propagating the said disease, by the officer of the city of *Baltimore*, authorised to act on such occasions, to wit, the health officer or his assistant; and if they shall believe, that the said expenses have been paid to the parties incurring them, in the first instance by the plaintiffs, and that the defendant was the consignee of the said ship at the time referred to, then the plaintiff has a right to recover from defendant, so much of said expenses as are reasonable and fair of their kind."

2. If the jury believe from the evidence, the facts set forth in the first prayer, that the plaintiffs have a right to recover, notwithstanding the charter party exhibited in evidence. To the granting of which prayers, or either of them, the defendant objected, but the court (*PURVIANCE*, A. J.) overruled their objection, and granted each of the said prayers. The defendant excepted.

2ND EXCEPTION. The evidence having been given as stated in the defendant's first bill of exceptions, the defendant prayed the court to instruct the jury as follows:

1. If the jury find the expenses incurred and claimed in this action, were not necessary to preserve the health of the city of *Baltimore*, and were not necessary to prevent the introduction

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of small pox into the said city, by or through the instrumentality of the *Ellen Brooks*, the persons, baggage or articles on board of her, then the plaintiff cannot recover, and the recovery must be limited to the amount of expenses absolutely necessary to preserve the health of the city, or to prevent the introduction of small pox.

2. That under the true construction of the ordinance, the expenses which can be recovered, are those incurred in disinfecting and purifying the *Ellen Brooks*, the persons, baggage and articles on board of her at the time of her arrival at the port of *Baltimore*, from the infection of the small pox, and the jury can render a verdict only for such amounts as were properly incurred, in such disinfection and purification from the infection of small pox, of the said vessel, persons, baggage and other articles.

But the court (PURVIANCE, A. J.,) refused to grant the said prayers, or either of them, as they stand, but did grant them with the following modification, and instructed the jury as follows:

The qualification of the said first prayer of the defendant, was, to strike out all of it, after the word "recovery," and insert, "must be limited to such amount of expenses as in the opinion of the health officer was necessary to disinfect the vessel, cargo and passengers of the said disease, and to prevent their propagating the same."

And the qualification of the second prayer was, to strike out all of it, after the word "amounts," and insert the following—"as in the opinion of the health officer were necessary to disinfect the vessel, cargo and passengers of the said disease, and to prevent their propagating the same."

To which refusal to grant the said prayers, and each of them as they were presented, and to which granting of the said prayers, and each of them with the said qualifications, the defendant excepted.

3RD EXCEPTION. The evidence having been given as stated in the defendant's first bill of exceptions, the defendant then prayed the court as follows:



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3. That under the true construction of the ordinance in question, the health officer had no power to send to the small pox hospital, any but those persons who, when sent, were affected with the small pox or varioloid disease, and that no expense incurred from the sending of any other persons, can be recovered in this action.

4. That if the jury find, that the health officer required the captain of the *Ellen Brooks* to furnish fresh provisions for such persons as remained on board the *Ellen Brooks*, and were not removed to the small pox hospital, and did this with a view to prevent the spread of disease, then the remedy for the violation of such requisition, if any, was under the 8th section of the ordinance, against the captain of this vessel, and the fact that the health officer did furnish the provisions in question, does not authorise the recovery of the amount so furnished in this action.

5. That the expense incurred and paid by the health officer, under the 7th section of the ordinance, could only be collected from the party charged by him, and if such charge was made in this case in the first instance, against the captain of the *Ellen Brooks*, then it ought to have been collected from him, and there having been no effort made to recover this amount from the captain, there was no obligation on the part of the city to pay it, and such payment was therefore voluntary, and does not entitle the city to recover in this action.

6. That the Mayor and City Council of *Baltimore*, have full power to provide by ordinance for the preservation of the health of the city, and to prevent the introduction of contagious diseases, but this power does not confer any right on the corporation to impose upon the owner, captain or consignee of a vessel arriving at the port of *Baltimore*, the expense of curing all passengers arriving in their vessels at that port, nor the expense of providing them with such provisions as the health officer of that port may order for their use, in a case where the charterers of the vessel have undertaken to provide for all expenses of passengers, and that there can be no recovery in this action, for the amount paid for curing the passengers in

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the small pox hospital, or the amount paid for furnishing provisions by the health officer.

7. That under the true construction of the ordinance, the expenses which can be recovered from the owner, consignee or master, are confined to the disinfecting and purifying the vessel and baggage and articles on board of the vessel, and does not extend to the support and cure of the passengers, who were removed to the small pox hospital, nor to the provisions furnished by the health officer for the use of the passengers who remained on board of the vessel.

8. If the jury find, that the *Ellen Brooks* was chartered in the manner given in evidence, at *Liverpool*, to perform a voyage to *Baltimore*, and that the charterers were to pay all expenses of passengers; and further find, that all expenses claimed in this action, arose from the diseases among the passengers on board the said vessel; and further find, that the defendant in this action had no agency in effecting the said charter party, and his control over the said vessel, as consignee, was to take effect from and after the full performance of all the stipulations in the said charter party, and performances of the said voyage, then the defendant is not responsible in this action.

9. If the jury find, that the defendant in this action was the ship's husband, rather than the consignee, and acted as ship's husband, then he is not responsible in this action.

10. If the jury find, that some of the passengers who were removed by the order of the health officer to the small pox hospital, were afflicted with small pox, and some with typhus, or some other diseases different from small pox or the varioloid disease, there can be no recovery in this action for the expense of removal, board and medical treatment, at the said hospital, incurred on account of the said passengers who were not afflicted with the small pox, unless the jury find, that such expenses were necessary to disinfect and purify the said passengers from the infection of the small pox.

11. If the jury find, that the passengers who remained on board said vessel were not sick, and find that the health officer furnished them with fresh provisions, there can be no recovery

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on account of the expense of such provisions, unless the jury find, that such expense was necessary to disinfect and purify them from the infection of the small pox.

12. There can be no recovery in this action, for any expense incurred on account of any passenger not afflicted at the time of incurring such expense, with the small pox, or varioloid disease, unless the jury find that such expense was necessary to prevent such passenger from being infected with the small pox, and that no expense incurred exclusively in curing any passenger of any disease, different from the small pox or varioloid disease, or in preventing such other disease, can be recovered in this action.

But the plaintiff having objected to the same, the court (PURVIANCE, A. J.,) rejected all and each of them, and refused to grant any one of them, to which refusal to grant any of them, and to which rejection of all and each of them, the defendant excepted.

The verdict and judgment being against the defendant, he appealed to this court.

The cause was argued before STEPHEN, ARCHER, DORSEY, and CHAMBERS, J.

By GEO. M. GILL and G. L. DULANY for the appellant, and  
By MARSHALL for the appellees.

DORSEY, J., delivered the opinion of this court.

By the act of the General Assembly of *Maryland*, incorporating the *Mayor and City Council of Baltimore*, it is enacted, "that the corporation aforesaid shall have full power and authority to enact and pass all laws and ordinances necessary to preserve the health of the city, prevent and remove nuisances; to prevent the introduction of contagious diseases within the city, and within three miles of the same." The transfer of this salutary and essential power is given in terms as explicit and comprehensive as could have been used for such a purpose. To accomplish, within the specified territorial limits, the objects enumerated, the corporate authorities were clothed with all the



legislative powers which the General Assembly could have exerted. Of the degree of necessity for such municipal legislation, the *Mayor and City Council of Baltimore* were the exclusive judges. To their sound discretion was committed the selection of the means, and manner (contributory to the end) of exercising the powers, which they might deem requisite to the accomplishment of the objects of which they were made the guardians. "To prevent the introduction of contagious diseases within the city, and within three miles of the same," they might impose heavy penalties on the captain, owner or consignee of any ship or other vessel entering the port of *Baltimore*, on board of which the small pox or other contagious disease might prevail; or they might seek the accomplishment of their object by causing the vessel and all persons on board to be taken possession of and controlled until their purification and disinfection were effected, and impose on the captain, owner or consignee the payment or re-imbursement of all the expenses incurred by such proceedings; or they might adopt at the same time both the suggested remedies, if for the successful and faithful execution of their powers, they deemed it necessary to do so.

With this view of their powers, let us see what laws or ordinances have been passed by the *Mayor and City Council of Baltimore* in relation to the case now before us. By No. 12 of the revised ordinances, page 47, they have provided for the appointment of a "health officer," and prescribed his duties and powers; and by the sixth section thereof, it is enacted, "that the health officer or his assistant shall visit all vessels that may come to at the quarantine ground, as directed in the fifth section of this ordinance, as soon as practicable, in daylight, after the knowledge of such fact shall have been, by any means, obtained by him; and said officer is hereby authorised and directed to send all persons afflicted with the small pox or varioloid disease, who may be found on board such vessel, to the small pox hospital, until a receptacle for small pox patients be provided at the *Lazaratto*; to take or direct such measures in regard to the officers, crew and passengers, as in

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his opinion may be necessary to disinfect them and to prevent their propagating the disease.” And by the seventh section of the ordinance, it is enacted, “that the expenses which may be incurred in the disinfecting and purifying of such vessels, persons, baggage or other articles from the infection of small pox, as provided for in the sixth section of this ordinance, shall be done at the proper costs and charges of the commander, captain, owner or consignee of the vessel infected; and such part thereof as it may be necessary for the health officer to incur in the first instance, shall be charged to the commander, captain, owner or consignee, or either of them, in the discretion of the health officer, and collected by him, but if it cannot be so collected, the amount which he shall have necessarily expended, for the purpose aforesaid, shall be refunded or repaid by the register of the city, with the approbation of the mayor.”

With this outline of the powers and duties of the *Mayor and City Council of Baltimore* and the health officer, we now proceed to examine the several prayers and instructions given and refused by the court to the jury, which by the bills of exceptions taken in the cause are brought up to be reviewed in this court.

In granting the plaintiff's first prayer in the first bill of exceptions, and overruling the defendant's objection thereto, we think the county court committed no error. Of all the facts submitted in that prayer to the finding of the jury, there had been testimony offered, legally sufficient, to have warranted such finding. And if those facts were found, the plaintiff's right to recover to the extent claimed by his prayer, followed as the natural and legal consequence.

We think the court below were also right in granting the plaintiff's second prayer and overruling the objection made to it by the defendant. The *Mayor and City Council of Baltimore* had the power, as they have done, to visit the penalty for the introduction of a contagious disorder within the limits prescribed by the Act of Assembly, on the owner, the captain, or consignee of the vessel. Of the charterer of the vessel, they

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are not presumed to have had knowledge. And if they had, what has he to do with a contagious disorder prevailing amongst the crew? And even conceding he were responsible therefor, could the salutary power, vested in the corporation in this respect, be effectuated, by making him only answerable, who, perhaps never was and never would be within the reach of the process of our judicial tribunals, and might be a resident, if any settled residence he had, of the most remote portion of the commercial world.

We concur with the county court in the propriety of its rejection of the appellant's two prayers in his second bill of exceptions. The first part of the first prayer having been granted. Whether the court were right or wrong in doing so on this appeal, it is unnecessary for us to inquire. But the second part of that prayer, and which was refused by the court, was, that the recovery of the plaintiffs "must be limited to the amount of expenses absolutely necessary to preserve the health of the city, or to prevent the introduction of small pox." By granting this instruction the rights of the plaintiffs would have been unreasonably and illegally restricted. It limited the right of recovery, not only to expenses, incurred in the soundest exercise of economical discretion, and of the greatest professional skill and judgment, by the health officer, but it deprived them of the right of recovery thereof, if the jury, judging perhaps from results and circumstances, occurring after the authority of the health officer had been thus exerted, should be of opinion, that the expenses incurred, had not been "absolutely necessary to preserve the health of the city, or to prevent the introduction of small pox." The right of the plaintiffs to recover is dependant on no such occurrences, is confined to no such restrictions. If the health officer, in causing these expenses to be incurred, acted *bona fide* within the limits of a sound discretion, and with reasonable skill and judgment, in this discharge of his official duties, the reasonable expenses thus incurred must be paid by the defendant. But we think the court below erred in instructing the jury according to their qualification of the defendant's first prayer. The portion of the prayer



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which was *retained by the county court* and given to the jury, was, that “if the jury find the expenses incurred and claimed in this action, were not necessary to preserve the health of the city of *Baltimore*, and were not necessary to prevent the introduction of small pox into the said city, by or through the instrumentality of the *Ellen Brooks*, the persons, baggage, or articles on board of her, then the plaintiff cannot recover.” With this part of the instruction the defendant surely had no reason to be dissatisfied. It submits, exclusively to the finding of the jury, the question as to the necessity of the expenditures made. Of that necessity they were created the sole judges. But to this instruction the court appended the following modification, viz: “and the recovery must be limited to such amount of expenses as in the opinion of the health officer was necessary to disinfect the vessel, cargo and passengers, of the said disease, and to prevent their propagating the same.” Uniting that portion of the prayer granted, with the court’s modification thereof, we must confess we are much at a loss how to reconcile them, or to discover what was the instruction which the court designed to give to the jury. Viewing them separately, the meaning of each is obvious enough, but their consistency is not so apparent. By the modification, the jury were told that the plaintiffs’ recovery must be limited to such “amount of expenses as in the opinion of the health officer was necessary to disinfect the vessel, cargo and passengers of the said disease, and to prevent their propagating the same.” Thus making the opinion of the health officer the sole ground upon which the verdict of the jury must be formed; and, in effect, withdrawing from their consideration the expenses which had actually been incurred and the question previously submitted to them, as to the necessity, in point of fact, for incurring those expenditures. And, in truth, instructing the jury to find a verdict for such amount of expenses as in the opinion of the health officer was necessary, although the jury might believe that the health officer, in forming his opinion, had acted *mala fide*, had given countenance to the grossest extravagance, and exorbitance of charges, and had shewn himself destitute of all

professional skill and judgment, and wholly incompetent to make the estimates requisite to the formation of a correct opinion upon the subject. And it is a peculiarity in this instruction, that in that part of it granted at the instance of appellant, it denies to the health officer all right to decide on the necessity of the expenditures to preserve the health of the city, (a necessity of which it may be presumed he was peculiarly competent to determine,) and submitted the determination of that necessity exclusively to the jury; yet in the ascertainment of the amount to be recovered, they were denied the exercise of all discretion and judgment, and were confined "to such amount of expenses as in the opinion of the health officer was necessary to disinfect the vessel, cargo and passengers of the said disease, and to prevent their propagating the same." Notwithstanding it did not appear that he had any particular knowledge of the great portion of those expenses, or that they were incurred under his supervision or management, but on the contrary, that they occurred after he had ceased officially to have any agency in relation to them, and when the patients, or persons infected, were under the care and management of the physicians and nurses of the small pox hospital; of whom there is no ground for presuming that the health officer was one. Of the amount and necessity of the expenses that accrued at the small pox hospital, (which form the great bulk of the amount in controversy,) the physicians and nurses thereof possessing actual knowledge, were more competent than the health officer to give opinions and testimony as to the necessity thereof, for the purpose for which such expenditures were authorised. The county court therefore erred in its opinion which excluded such testimony from the consideration of the jury.

The second prayer appears to us to have been properly rejected by the court, because it called for an instruction to the jury, that no expenses could be recovered, which were not "incurred in disinfecting and purifying the *Ellen Brooks*, the persons, baggage and articles on board of her at the time of her arrival at the port of *Baltimore*." Whereas, the ordinance

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not only authorises the health officer “to take or direct such measures in regard to the officers, crew and passengers, as in his opinion may be necessary to disinfect them;” but also “to prevent their propagating the disease.” For aught that we can know, one-half the expenses incurred, might have arisen, not from the measures taken by order of the health officer to disinfect or purify the officers, crew and passengers, but “to prevent their propagating the disease.” The qualification given by the court to the second prayer in this exception, is almost identical with the modification made of the first prayer, and is erroneous for the same reasons.

We concur with the county court in the rejection of the appellant’s third prayer, that under the ordinance “the health officer had no power to send to the small pox hospital any but those persons who, when sent, were affected with the small pox or varioloid disease, and that no expense incurred from the sending of any other persons, can be recovered in this action.” The disposition to be made of persons afflicted with the small pox or varioloid disease is not left to the discretion of the health officer. The ordinance peremptorily directs them to be sent to the small pox hospital. But the discharge of this ministerial service is not the only duty imposed on the health officer, by the ordinance, in respect to the persons on board such vessel. He is further required “to take or direct such measures in regard to the officers, crew and passengers, as in his opinion may be necessary to disinfect them, and to prevent their propagating the disease.” If then, in pursuing such measures, the health officer, acting with reasonable skill and judgment, and with a sound and honest discretion, had sent others of the crew and passengers, than those afflicted with the small pox, to the small pox hospital, we can see no sufficient objection to its being done, or to the recovery of all reasonable expenses incurred in their disinfection and purification, or during their necessary detention for the prevention of their propagation of the small pox.

The county court, we think, was obviously right in rejecting the appellant’s fourth and fifth prayers in his third bill of exceptions.



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The rejection of the appellant's sixth prayer we also approve of. For although there are parts of this prayer which, if standing alone, the county court would have granted without the slightest hesitancy, yet they are coupled with other matters, so obviously wrong and inadmissible, that acting on the prayer as an entirety, it was properly refused by the court.

The seventh prayer was properly refused by the court below, for reasons assigned by this court in the previous part of its opinion.

The eighth prayer was rightly rejected, because it called on the court to leave to the finding of the jury certain conditions and qualifications, on which the appellant assumed to act as consignee of the vessel, of which no testimony had been offered.

No proof having been offered, which was legally sufficient to have warranted the jury in finding the fact, that the appellant was the ship's husband, and not the consignee of the vessel, his ninth prayer could not be otherwise than rejected.

The tenth prayer, for reasons stated in previous parts of this opinion, was correctly rejected by the court.

The rejection of the eleventh prayer also meets our approbation, because, although the expenses incurred for fresh provisions may not have been necessary in the sense in which those terms are used in the ordinance, yet, according to the testimony of the health officer, they may have been necessary to prevent the propagation of the disease.

We concur with the county court in its rejection of the twelfth prayer. By it the court were requested to instruct the jury, "that there can be no recovery in this action, for any expense incurred on account of any passenger, not afflicted at the time of incurring such expense, with the small pox or varioloid disease, unless the jury find that such expense was necessary to prevent such passenger from being infected with the small pox." This prayer the court clearly could not have granted consistently with the ordinance, as it would have excluded all allowances for expenses incurred for the disinfection, purification, and necessary detention of the passengers, to prevent the propagation of the contagious disease.

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We concur with the county court in granting the plaintiffs' prayers in the appellant's first bill of exceptions, and in its rejection of all his prayers in the third bill of exceptions; and we also concur in its rejection of the appellant's two prayers in the second bill of exceptions, but we dissent from the modified instruction given by the court to the jury under the first prayer, and also from its qualified instruction given under the second prayer, and therefore reverse its judgment.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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**THE SAVAGE MANUFACTURING COMPANY vs. Z. H. WORTHINGTON, EXECUTOR OF WILLIAM WORTHINGTON.—*December 1843.***

Z. sold to W. a tract of land, gave him a bond of conveyance, and received his promissory note signed by him, *first* in his own name, and *secondly* as agent for the S. M. Company. The latter was a manufacturing institution, and required land for its operations. The note not being paid, Z. brought his action against both; the Company only appeared; the declaration counted upon the note. The proof showed that the agent was the general agent of the Company; had bought other land for the use of the Company which it retained and paid for, and that the agent was in the habit of signing its notes as agent, which were paid by the Company. **Held:** that the bond of conveyance was the only legal evidence of the nature and character of the contract, and that the purchase was made by W, on his own account; and as the Company was not authorised to become surety by its charter, the note was a nullity.

Where a note is executed by an agent before it is admissible in evidence, it is necessary to prove, not only his signature, but the authority by which it is made.

A bond of conveyance which recites that the obligor did sell to the obligee, and contract and agree to grant and convey to him, his heirs and assigns, a certain tract of land, acknowledging the receipt of the cash part of the purchase money from him, with the notes of the obligee, and another for the balance thereof, and stipulating until default should be made in the payment of the purchase money, that he should hold the land sold as aforesaid, demonstrates that the obligee made the purchase on his own account, and parol evidence is not admissible to contradict it in that respect.

Where by the terms of a charter a manufacturing company had no power to assume the responsibility of a surety, the note of such a company executed upon no other consideration than as surety, is void.

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Parol evidence is inadmissible to prove that a grant made to one person was intended to be made to another.

APPEAL from the *Howard District Court of Anne Arundel County*.

This was an action of *assumpsit*, commenced on the 17th April 1840, by the appellee against the appellants and *Amos A. Williams*. The latter was returned *non est*, &c., and did not appear to the action.

The plaintiff declared, for that whereas the said *Amos A. Williams*, and the said the *Savage Manufacturing Company* (by its then agent, *Amos A. Williams*, in that behalf,) heretofore, to wit, on, &c., at, &c., made their certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, one year after the date thereof, to the said plaintiff, one thousand three hundred and sixty-six dollars and two thirds of a dollar, with legal interest thereon, for value received by the said *Amos A. Williams* and the *Savage Manufacturing Company*, the defendants in this action, and then and there delivered the said note to the said plaintiff; by reason of which premises, &c., and being so liable, &c. And also upon the common counts.

The defendant, the S. M. Co., pleaded *non-assumpsit*, on which issue was joined.

1ST EXCEPTION. The plaintiff in order to prove the issue on his part, offered in evidence the following promissory note, having first proved it to be signed and delivered by *Amos A. Williams*, as thereby appears.

SAVAGE, *Anne Arundel County, March 11th, 1839.*

“\$1,366 $\frac{2}{3}$ . One year after date, we promise to pay to *Zachariah H. Worthington*, executor of *William Worthington*, deceased, or order, one thousand three hundred and sixty-six dollars, and two-thirds of a dollar, with legal interest thereon, for value received.

AMOS A. WILLIAMS,

AMOS A. WILLIAMS,

*Agent for Savage Man'ng Co.*”

Witness,—*John G. Holland.*



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To the admissibility of which note in evidence, the defendants by their counsel objected, on the grounds that it does not sustain, but substantially varies from the declaration, which objection for the reason assigned the court, (DORSEY, C. J., WILKINSON and BREWER, A. J.,) overruled. The defendants excepted.

2ND EXCEPTION. The plaintiff to support the issue joined on his part, proved by the subscribing witness thereto, the execution and delivery of the above recited promissory note, at the same time declaring his intention in connexion therewith, to offer to the jury, the testimony on his part, hereinafter mentioned and referred to, and therefore read the said note in evidence to the jury. The defendant, by the consent of the counsel and of the court, reserving his right to object to the admissibility of said note in evidence to the jury, until all evidence in relation thereto had been given to the jury. The plaintiff further proved by a competent witness, that several notes were given him within a few years past, for a considerable sum of money, which were signed in exactly the same manner in which the note sued upon in this cause is signed, and that one of said notes was paid him by the said company, in the year 1840, and that another note was given him for a considerable sum of money, which was drawn in favor of the said the *Savage Manufacturing Company*, or order, and signed by *Amos A. Williams* as the drawer, and that this note was endorsed on the back of the same, "A. A. W., agent for S. M. Co.;" and that said note was paid by said company, on or before the year 1840; and that said witness held another note drawn in his favor, by said A. A. W., in his individual capacity; that said witness was in the employment of the company, and had lived at the place where the works were situated, and had been familiar with the transactions of the said company for many years.

The plaintiff also offered to prove, and did prove by another witness, that a promissory note was signed by A. A. W., for a considerable sum of money, and was drawn in favor of the said the S. M. Co., and made payable to the order of the said

company, which was endorsed in the following manner: "A. A. W., agent for S. M. Co.," and that said note was given to the sister of the witness by said A. A. W., as agent of said company; that he, the last mentioned witness, presented said note for payment to a clerk of said company, and that said clerk said he could not pay the same, until he made inquiries of the said company; that sometime afterwards, said witness called upon the said last mentioned clerk, who paid him the interest due on said note, and that said payment was made in the year eighteen hundred and thirty-nine or forty. And the plaintiff for the purpose of further proving the issue in this cause, shewed by yet another witness, that he had in charge a promissory note for a considerable sum of money, drawn and signed by A. A. W., payable to the said the S. M. Co., or order, and that said note was endorsed, A. A. W., agent for S. M. Co., and which note was given to the brother of the witness by the said A. A. W., and that he, (the witness,) presented the same for settlement, and a portion of the same was paid by the said company within a short time past; and also offered evidence to the jury by competent witnesses, who had been debtors to the S. M. Co., that they had severally settled and paid to said A. A. W., as agent of the said company, their respective debts, and taken the receipts of said agent, signed, "A. A. W., agent for S. M. Co.;" and that they had never afterwards been called on by said company or its agents, for the payment of such debts.

The plaintiff also offered proof by a number of witnesses, that A. A. W., who signed this note sued upon, acted as the general agent of the company, at the place where its works are carried on, and that for fifteen or eighteen years, he the said A. A. W., had been considered, and up to the time when this note was given, was considered the general agent of said company, and transacted all their business as such of every kind, done at the place where such company's works are situated. The plaintiff also gave in evidence certain deeds and proceedings in Chancery, which showed a conveyance of land under decree of the court to the S. M. Co., but as they are only

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inducement to certain parol proof, the reporter deems it unnecessary to insert the same. The deeds were dated in 1828, 1837 and 1838, and the decree in 1828.

And the plaintiff further proved, that the said A. A. W., negotiated, as agent of the said company, and purchased the lands mentioned in the said deeds to said company.

The plaintiff also, for the purpose of sustaining the issue on his part, offered in evidence by the subscribing witness to this note, sued on in this case, that he was called upon by the said A. A. W., to negotiate for the purchase of the land for which this note was given; that he (the witness,) applied to the plaintiff and negotiated with him in relation to the purchase of said land, and that said witness was under the impression, when called upon by said W., and during the term of his negotiation, and at the time when he applied to the plaintiff in relation to the same, and is now under the impression, that said land was to be, and has been purchased for the use and benefit of the said company, and that said witness resided for many years at the works of the said company, and in its employment, and was familiar with its transactions; and that the said witness had previously been employed by the said A. A. W., as general agent for said company, to negotiate a purchase of other lands which were since conveyed to and are now held by the company, and the instructions of the witness in this purchase, were exactly similar to those in the former, he understanding at that time (although the name of the company was not used by the said A. A. W. at either,) that he was acting for the company. And the plaintiff further proved by said witness, that the object of purchasing the land of the plaintiff, as stated to witness by A. A. W., was to furnish wood and ore for a furnace, which was built on the lands of the company, which furnace was built by hands that were paid at the store of the company, by orders drawn on A. A. W., as agent of said company, in the same manner as the other hands or laborers of said company were paid. And further, that the said furnace after its erection was carried on for some time by said company.

And the plaintiff for the purpose of further sustaining the issue joined on his part, offered the following extracts from a



book offered in evidence by the defendants, as the minutes of the proceedings of the said company:

“*Resolved*, That to the agent in town be exclusively confined the financial concerns of the company, to whom alone is given the authority to sign and provide for the obligations of the company, and to attend to its pecuniary arrangements.” And also the following:

*Resolved*, That *Amos A. Williams* be appointed general superintendent of the company’s affairs at the factory, and from said book it appears that said resolutions were passed on the 3rd January 1842, by the said company. It was further offered in evidence by the plaintiff, that several houses had been erected on the lands of the S. M. Co. between the years 1837 and ’39, under the superintendence of said A. A. W. as general agent, and that the iron made at the furnace was used in the company’s foundry, and if the said furnace had been in successful operation it would have been of great benefit to the S. M. Co.

The defendants to maintain the issue on their parts, first offered in evidence the act of incorporation, passed December session, 1821, chapter 201, and the act supplementary thereto, passed December session, 1825, chapter 169, and also gave in evidence the testimony of *Thomas C. Miller*, a legal competent witness, that he had been storekeeper, agent and a confidential clerk, at the works in this district of said defendants; that their works consisted of a cotton mill, grist mill, saw mill, machine shop, foundry, blacksmith and wheelright shops, and a country store, of which last he had the special charge; that he had been upwards of fifteen years so employed; that they had also made and sold bricks; that Mr. A. A. W. *was during that time general agent of said defendants*; his duties were to superintend the above operations of the defendants’ works as aforesaid; that while so acting he did sometimes borrow money for the defendants’ use, which was repaid; knows that A. A. W. had purchased land for himself; had purchased land of a *Miss Dorsey*; knows of this, his purchase from *Worthington*; the *Savage Rail Road* was made during his employment at the

works; Mr. A. A. W., of his knowledge, borrowed some money of *Miss Dorsey* for which he gave a note, signed as agent of the defendants; the money was for his own purposes; he, *Miller*, paid the interest on it without instructions from any one; the town agent instructed him not to pay it, but he paid it on his own responsibility; knows of *Holland's* claim against the company, the defendants is now in controversy; is upon a note signed by A. A. W., agent S. M. Co; knows for what the money in said note was borrowed; it was for the *Savage Rail Road Company*; said defendants have no interest in said rail road company; knows that defendants refused to have any thing to do with the furnace; knows that the furnace was *not* put in operation by the company; it was carried on by A. A. W., C. D. W. and *Thomas Landsdale*; it was built on the company's land; the hands were paid by A. A. W. at the store, by orders drawn by one *Ludd*, superintendent of the building, on A. A. W., agent S. M. Co.; A. A. W. also paid at same place the defendants' hands; the defendants had nothing to do with them; business transactions were also done of his at the same place; the hands were paid as other hands were, every two weeks; a separate pay roll for each department of defendants' concerns was made out, containing a list of hands, number of hands, rate of wages of each and total amount, then were added up and transmitted to the agent in town; there never was a pay roll for the furnace, nor was the amount paid its hands ever transmitted to town; the superintendent of the building, *Mr. Ludd*, drew on A. A. W., agent, orders for the pay; they were never transmitted to the agent in town; no buildings other than the furnace were put on the company's land between the years 1837 and 1840; long before the furnace was put up, in the dry summer months there was a deficiency of the needful supply of water for the use of the cotton mill; the lands purchased of *Snowden* were for the possession of *Hammond's* branch, to be turned into the defendants' stream, which was done accordingly. By the cross examination of *John Holland*, the plaintiff's first witness, it was proved that since A. A. W's sickness, *George Williams*, the company's

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agent in *Baltimore*, paid one note for money borrowed of him; refused to pay another which is now in suit; did not know for whom the land was bought that was purchased of *Worthington*. The defendants also gave in evidence the charter of the *Savage Rail Road Company*, passed December session 1834. The defendants also gave in evidence the two books purporting to contain bye-laws and minutes of the defendants, after having offered evidence by one of the clerks and one of the corporation, that the said bye-laws and minutes, and the parts read in evidence, were the authentic bye-laws of said company and minutes, and the following parts and entries were read therefrom:

*Extracts from the first book of minutes of the Savage Manufacturing Company:*

*Baltimore, 26th March, 1824.* At a meeting of the S. M. Co. (a quorum being present) it was resolved, That A. A. W., the agent, be and he is hereby authorised to sign and endorse notes on behalf of the S. M. Co., for the purpose of borrowing from the *Bank of Baltimore*, a sum not exceeding \$12,000, and to that end that he be authorised to use the name and seal or the name of said company, and also to sign or endorse notes for the renewal of such loan, so long as the said bank and company may consent and agree.

*Extract from the second book of minutes:*

*Baltimore, March 5th, 1832.* General rules for the government of the *Savage Manufacturing Company*:

1st. The agent at the factory shall superintend all the concerns of the company there; he shall collect the rents of the houses, &c. &c.; he shall manage and control the company's store; he shall govern and regulate the farm—and shall superintend the grist mill, saw mill, smith's shop, &c., with power to purchase wheat, beef, hay, corn, &c., necessary for the support of the establishment.

2nd. The agent at the factory shall furnish an annual written statement of all the accounts of money received and disbursed by him, and oftener if required by the company, in a plain and



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intelligible manner, distinguishing therein the affairs of the rents, the farm, the saw mill, the smith's shop, and the store and grist mill, and shall be and is hereby authorised to employ a clerk in his discretion, and to compensate him accordingly.

6th. At the regular meetings of the company, and at none others, authority may be given for sales and purchases, and for extending improvements or increasing machinery, not hereby delegated to the respective agents. The foregoing rules were unanimously adopted.

*Baltimore, October 7th, 1833.* At a quarterly meeting, the following resolutions were adopted:

“*Resolved*, That no further expenditures of any kind shall be made, nor expenses incurred in any department of the company's works, until the whole debt of the company is discharged, except for the conducting of the works in their present condition.

“*Resolved*, That as soon as the *Baltimore and Ohio Rail Road Company* shall have completed their road nearly to the company's ground, a passable wagon road shall be made by the company, so as to intersect the rail road. And the object of this present resolution is expressly declared to be, to negative any views or suggestions tending to the project of making a rail road.”

*June 8th, 1836.* At a special meeting of the stockholders upon the representation of the agent in town, as to the importance of the purchase of a small piece of land, belonging to the estate of the late *Thomas Snowden*, which is to be sold at auction on the 14th of this month, it was resolved, that the agent at the factory, be and he is hereby authorised to purchase said land at what he may deem it worth.

The defendants also further offered in evidence by the testimony of *Joseph Plummer*, a competent witness, that *John Holland* had, in a conversation with him about said controversy with said defendants, said that he had loaned \$500 to A. A. W.; that A. A. W. had paid him by a check on a bank in *Baltimore*; that subsequently in loaning him other \$500, told him

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he had not used the check, returned the check and received a note for \$1000. Mr. A. A. W. was asked by *Holland* for security; A. A. W. offered him a mortgage of his lands bought of *Dorsey*; he said he would take the company (the defendants,) as security; A. A. W. signed the note accordingly as agent for defendants.

The defendants also gave in evidence the testimony of *Chas. Marean*, a competent witness, who said he had been in the employment of the defendants for six years, from July 1834 to September 1841; that he kept all the company's books in town under the direction of *George Williams*, the town agent; that the defendants never kept a bank account in their name; all bank accounts were kept in the name of *George Williams*, the town agent; never heard of the note offered in evidence in this suit until Mr. A. A. W. was taken sick; when town agent was sick or absent, he *Marean* had sole charge of the company's concerns; never knew of any transaction of this kind; had it been a transaction of these defendants, he certainly would have known it; he kept the account of the transactions of the company; accounts were made up of each department once a year; accounts always made up in town; the company kept no bank account; he had nothing to do with A. A. W.'s accounts; A. A. W. drew the money for paying the hands; it was sent out some times by *Miller* or other trust-worthy persons; *Miller* made nearly all the purchases for the store; the furnace was not built by the company; no monies were ever sent out for that purpose; the money sent out was to pay defendant's hands; not to put up the furnace; whatever defendant's pay roll required, was sent out; every department's accounts were distinguished and separate; would know if the furnace account had been included; the furnace was complete and in operation a little while; there never was any thing in the accounts that included expenditures for the furnace; each pay list would shew its department of manufacturing; no agent for the furnace; no pay roll for it; the iron for the foundry was purchased in town and sent out; he would have remembered any drafts drawn in favor of the furnace.

On cross examination of *Snowden*, he testified that before the purchase of his land, *George Williams*, the town agent, came out and walked over the property; that he was paid for it by settling his bill and taking cash for balance.

The defendants further to support the issue on their parts, gave in evidence the following bond of conveyance, having, on the cross examination of *Tristram S. Dorsey*, a witness thereto, proved that the same was signed, sealed and delivered by the plaintiff, as thereby appears, to wit:

“*Know all men by these presents*, That I, *Zachariah H. Worthington*, of *Montgomery* county and *State of Maryland*, are held and firmly bound unto *Amos A. Williams*, of *Anne Arundel* county and *State* aforesaid, in the full and just sum of eight thousand dollars, lawful money, to be paid to the said *Amos A. Williams*, or to his certain attorney, executors, administrators or assigns, to the payment whereof, I bind myself, my heirs, executors and administrators, firmly by these presents, sealed with my seal, and dated this 22nd day of April, in the year of our Lord one thousand eight hundred and thirty-nine.

“Whereas, the said *Zachariah H. Worthington*, as executor of the last will and testament of his father, *William Worthington*, late of *Montgomery* county aforesaid, deceased, did, on the eleventh day of March, one thousand eight hundred and thirty-nine, pursuant to the power and authority vested in him by the last will and testament aforesaid, sell to the said *Amos A. Williams*, and contract and agree to grant and convey, or to cause and procure to be granted and conveyed to him, his heirs and assigns, all that part of a tract or parcel of land, lying and being in *Anne Arundel* county aforesaid, called *Thomas* and *Elizabeth*, whereof the above named *William Worthington* died seized, which is contained within the metes and bounds, courses and distances, following, that is to say, beginning for the same part at a stone planted, &c. In consideration of the sum of \$4,100, one-third part whereof paid by the said A. A. W. to the said Z. H. W. before the execution of this bond, and the remaining two-thirds secured by two promissory notes, dated the aforesaid 11th March 1839, drawn



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by the said A. A. W. and the S. M. Co., to and in favor of the said Z. H. W., as executor of the said W. W., deceased, or order, for the sum of \$1,366 $\frac{2}{3}$ , each one of them payable at one year, and the other at two years after date, which notes bear interest; the receipt and payment of which said sum of \$1,366 $\frac{2}{3}$ , and the delivery to him of the two promissory notes above recited or referred to, the obligor in this bond doth hereby acknowledge.

“Now the condition of the foregoing obligation is such, that if upon payment of the residue of the purchase or consideration money, and interest secured by the above recited promissory notes, at the times limited by said notes for the payment of the same, the said Z. H. W. do and shall well and sufficiently grant and convey, or cause and procure to be granted and conveyed unto the said A. A. W., his heirs and assigns forever, the two parts of a tract or parcels of land above described, with the appurtenances, having first procured a ratification of such sale according to law, and that by such deed or deeds of conveyance and assurance in the law, as shall or may be reasonably advised or devised, and required by the said A. A. W., his heirs or assigns, or his or their counsel; and if until such conveyance be made, perfected and delivered, or until default be made in the payment of the residue of the purchase money and interest mentioned, to be secured by the aforesaid promissory notes, or of some part thereof, at the times limited by said notes for the payment of the land, the said A. A. W., his heirs and assigns, be suffered and permitted, peaceably and quietly, to enter into, have, hold and enjoy the parts of a tract of land and premises, so as aforesaid sold and contracted, to be conveyed, with the appurtenances, without any manner of let or hindrance or interruption, of, from or by any person or persons, claiming legally or equitably, any estate or interest therein, or right or title thereto, through, by or under the within named *William Worthington*; then, and in those events, the foregoing obligation to be void and of no effect, otherwise to be and remain of full force and virtue in law.

ZACHARIAH H. WORTHINGTON, (Seal.)”

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It was admitted by the plaintiff and defendants, that the note given in evidence by the plaintiff, is one of the notes referred to in the said bond of conveyance, and that it was given to secure the payment in part of the purchase money for the land therein described.

The S. M. Co., defendants, then moved the court for their opinion and direction to the jury:

1. That the promissory note offered in evidence by the plaintiff, is not the note of the said *Savage Manufacturing Company*, and that they are not legal parties thereto.

2. That if the jury find from the evidence that no consideration passed from the plaintiff to the company aforesaid, then the said company are not responsible on the note offered in evidence as aforesaid, unless the jury further find from the evidence, that the said A. A. W. had authority to bind the company, by signing the said note as the agent thereof, or should find that there was a subsequent ratification or adoption of such signing by the company.

3. That if the jury find from the evidence that the note offered in evidence by the plaintiff, was given to secure the payment of the money therein stated, for a purchase of land made by and on behalf of A. A. W., then the said company are not bound therefor, the payment thereof, by reason of their legal incapacity to become a security for the fulfilment of the contract of another.

4. That if the jury find from the evidence that the note aforesaid, was given to secure the payment of the money therein stated, for a purchase of land made by and on behalf of A. A. W., then the said company are not bound for the payment thereof, unless the jury further find, that all the proprietors of stock in said company, by themselves or their authorised agents or guardians, assented to become security for the fulfilment of the said contract of A. A. W.

5. That if the jury find from the evidence that the note offered in evidence as aforesaid, was given to secure the payment of the money therein stated, for a purchase of land made by and on behalf of A. A. W., then the said company are not

bound for the payment thereof, unless the jury further find that the proprietors of two-thirds of the stock of said company in value and amount, assented that the said company should become security for the fulfilment of the said contract of A. A. W.

6. That if the jury find from the evidence that the S. M. Co. was, by Acts of Assembly, authorised to purchase and hold real estate and other property, for the purpose of carrying on manufacturing, as set out in said acts, and were also authorised by said acts, to appoint officers and agents in the prosecution of these objects; and further find that the said company did hold lands and other property, useful and convenient for their purposes, and did appoint A. A. W., as agent to superintend their operations; that such purchases, operations and appointments did not authorise the said A. A. W. to bind the said company to the payment of the sum specified in the promissory note, which has been offered in evidence in this case; provided the jury shall further find that the whole and only consideration of said note was land sold, or intended to be sold by the plaintiff to the said A. A. W., and that the plaintiff took said note from him, with knowledge that the same was intended as in payment, or in part payment, or as a security for the payment in whole or in part of the purchase money for such land.

7. That if the jury find from the evidence that the S. M. Co. was, by Acts of Assembly, authorised to purchase and hold real estate and other property, for the purpose of carrying on manufacturing, as set out in said acts, and were also authorised by said acts, to appoint officers and agents in the prosecution of these objects; and further find that the said company did hold lands and other property, useful and convenient for their purposes, and did appoint A. A. W., as agent to superintend their operations; that such operations, purchases and appointment did not authorise the said A. A. W. to bind the said company to the payment of the sum specified in the promissory note, which has been offered in evidence in this case; provided the jury shall further find that the whole and only consideration of said note was land sold, or intended to be



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sold by the plaintiff to the said A. A. W., and that the plaintiff took said note from him, with knowledge that the same was intended as in payment, or in part payment, or as a security for the payment in whole or in part for the purchase money for said land, unless the jury further find that the said A. A. W. was specially authorised by the said company to bind them by acts beyond the scope of his general agency, in the particular business carried on by the company, or should find that there was a subsequent adoption or ratification of such acts by the said company.

8. That if the jury find from the evidence that the S. M. Co. was, by Acts of Assembly, authorised to purchase and hold real estate and other property, for the purpose of carrying on manufacturing, as set out in said acts, and were also authorised by said acts, to appoint officers and agents in the prosecution of those objects; and further find that the said company did hold land and other property, useful and convenient for their purposes, and did appoint A. A. W. an agent to superintend their operations; that such purchases, operations and appointment did not authorise the said A. A. W. to purchase lands for the company, without their special authority, either previously given or subsequently ratified or adopted.

9. That if the jury find from the evidence that the S. M. Co. was, by Acts of Assembly, authorised to purchase and hold real estate and other property, for the purpose of carrying on manufacturing, as set out in said acts, and were authorised by said acts, to appoint officers and agents in the prosecution of those objects; and further find that the said company did hold lands and other property, useful and convenient for their purposes, and did appoint A. A. W. an agent to superintend their operations; that such purchases, operations and appointment did not authorise the said A. A. W. to purchase lands on his own account, and bind the company as his security, for the payment of the purchase money, without their special authority, either previously given or subsequently ratified or adopted.

10. That if the jury find from the evidence that the S. M. Co. was, by Acts of Assembly, authorised to purchase and hold

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real estate and other property, for the purpose of carrying on manufacturing, as set out in said acts, and were also authorised by said acts, to appoint officers and agents in the prosecution of those objects; and further find that the said company did hold land and other property, useful and convenient for their purposes, and did appoint A. A. W., as agent to superintend their operations; that such operations, purchases and appointment did not authorise the said A. A. W. to purchase lands on his own account, and bind the company as his security, for the payment of the purchase money, without their special authority, either previously given or subsequently ratified or adopted, and that there is no evidence in this case of any such special authority.

11. That if the jury find from the evidence that the S. M. Co. was, by Acts of Assembly, authorised to purchase and hold real estate and other property, for the purpose of carrying on manufacturing, as set out in such acts; and were also authorised by such acts, to appoint officers and agents in the prosecution of those objects; and further find that the said company did hold lands and other property, useful and convenient for their purposes, and did appoint A. A. W., as agent to superintend their operations; that such purchases, operations and appointment did not authorise the said A. A. W. to purchase lands on his own account, and bind the company as his security, for the payment of the purchase money, without their special authority, either previously given or subsequently adopted and ratified, and that there is no evidence in this case of any such special authority, nor any evidence from which such authority can be legally inferred or implied.

12. That if the jury find from the evidence that A. A. W. was the agent of the company for superintending their operations as manufacturers, the burthen of shewing that the said A. A. W. had authority to bind them as a security, for the payment of the sum of money specified in the promissory note, which has been offered in evidence in this case, rests upon the plaintiff.

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13. That if the jury find from the evidence that the note offered in evidence was given to the plaintiff to secure the payment of a portion of the purchase money, for land sold by the plaintiff to A. A. W., and that the said company had no interest in said purchase, then the plaintiff has no right to recover the amount of such note from the company, although the jury should further find that the said A. A. W. was the agent of the company, superintending those works, grounds, and business as manufacturers of cotton goods, and carrying on other concerns auxiliary thereto.

14. That by the act incorporating the said Manufacturing Company, the objects of such incorporation is declared to be the manufacturing and vending cotton goods, and the carrying on of any other branches of manufactures in their discretion; and the said A. A. W. being shewn by the evidence to be their agent, that unless otherwise proved, his agency is limited to the business of the company, connected with or relating to the objects aforesaid.

15. That the contract for the land to secure the payment of the purchase money, of which the note offered in evidence was given, was the individual contract of A. A. W., and not the contract of the defendants, because the bond of conveyance executed by plaintiff for said land, is the only legal evidence of the character of said contract.

And the court (DORSEY, C. J., WILKINSON and BREWER, A. J.,) gave the directions as asked in the *second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, thirteenth and fourteenth* prayers, but refused the instructions asked for in the *first, twelfth and fifteenth* prayers. To which refusal of the court the defendants excepted.

The verdict and judgment being against the defendants, they appealed to this court.

The cause was argued before STEPHEN, CHAMBERS and SPENCE, J.

By WILLIAMS and W. SCHLEY for the appellants, and  
By R. I. BOWIE for the appellees.



STEPHEN, J., delivered the opinion of this court.

We think there was error in the opinion of the court in the first bill of exceptions. The principle appears to be well settled, that where a note is executed by an agent, before it is admissible in evidence, it is necessary to prove, not only his signature, but the authority by which it is made. Speaking of the action of *assumpsit* on promissory notes, *Roscoe*, in his treatise on evidence, 174, says: "The making of the note will be proved by proving the handwriting of the defendant, or if made by an agent, by proof of the handwriting, and authority of such agent.

After it was admitted by both plaintiff and defendant, that the note given in evidence by the plaintiff was one of the notes referred to in the bond of conveyance, and that it was given to secure the payment in part of the purchase money for the land therein described, the defendants prayed the court to give several instructions to the jury, all of which were granted except the *first*, *twelfth* and *fifteenth* prayers; for the refusal to grant which, the defendants excepted.

It seemed to be conceded by the counsel for the appellants in the course of the argument, that the court below were right in refusing the *twelfth* prayer, it is therefore only necessary to decide upon the propriety of rejecting the *first* and the *fifteenth*.

The *first* prayer was, that the promissory note offered in evidence by the plaintiff, was not the note of the said *Savage Manufacturing Company*, and that they were not legal parties thereto. This prayer we think the court ought to have granted. It appears by the bond of conveyance (the execution of which was admitted by the parties,) that the purchase was made by *Williams*, on his own account. The conveyance was to be made to him and his heirs, and there is an express stipulation that he and his heirs shall quietly and peaceably enjoy the property purchased, without any hindrance by the said obligor, or any person claiming under him. The purchase, therefore, being made by him on his own account, and the note being given to secure the payment of the purchase money, the note was invalid and a nullity, so far as the appellants were attempted

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to be bound thereby. It being conceded, that by the terms of their charter, they had no power to assume such a responsibility.

The *fifteenth* prayer, we think, also ought to have been granted. The bond of conveyance was the only legal evidence of the nature and character of the contract, and it demonstrated that *Williams*, and not the company, was the purchaser of the land therein specified. Parol evidence was not admissible to vary or contradict it in that respect, as seems to be clear upon authority. See *Ros. Ev. J.* 9, and 12 *John. Rep.* 77, where it is said, that parol evidence is inadmissible to prove that a grant made to one person was intended to be made to another. See also same book, page 488, where it is said, "that parol evidence is inadmissible to show that a lease executed in the name of, and reserving a rent to one person, was intended for the benefit of another."

For these reasons we are of opinion that the judgment of the court below was erroneous, and ought to be reversed.

JUDGMENT REVERSED.

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### RICHARD R. WATERS AND OTHERS vs. THE STATE OF MARYLAND—*December* 1843.

The collector of taxes is regarded as an agent of the State, and where he admits the collection of taxes, he will not be heard to urge in his defence to a suit for their recovery, that the money he had received was on account of taxes which the legislature had no constitutional power to impose.

The question of constitutional authority to levy a tax, may arise between the collector and the person taxed, *before* payment, or *after* payment between the State and such person.

By the act of 1831, ch. 281, a board of managers was provided for, to remove free negroes and mulattoes from *Maryland* to *Liberia*. The treasurer was directed to pay them certain sums of money for the objects of their appointment, which he was authorised to borrow on behalf of the State. The 8th section of the act declared, that for the purpose of raising a fund to pay the principal and interest of the loans aforesaid, the levy courts, &c., were authorised annually to levy on the assessable property within their respective counties, clear of the expense of collection severally, as follows :

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on Montgomery county the sum of \$340.66, and so on each of the counties the specific sum mentioned in the act as to each, which said sums shall be collected in the same manner and by the same collectors as the county charges are collected, the levy court, &c., taking bond with sufficient security from each collector for the faithful collection and payment of the money in the treasury at the time of paying other public moneys, to and for the use of the State. **HELD :**

1st. That this tax was not laid for the support of government, but with a political view for the good government and benefit of the community, which is apparent from its provisions, and the general course of legislation on this subject.

2nd. That as the act required another bond to be given, payable to the treasury, the legislature never looked to the bond given under the act of 1794, ch. 53, as furnishing any security for the collection of the tax imposed by the act of 1831, ch. 281.

3rd. The collector's bond taken under, and in view of the act of 1794, ch. 53, is not responsible for the tax of 1831, ch. 281.

Before a law imposing a tax of a specific sum on each county, for the support of government, can be considered as violating the 13th section of the Bill of Rights, it ought to appear clearly, that the persons taxable are not made to contribute according to their actual worth in real and personal property.

In the absence of evidence, this court is bound to presume, that such a tax was laid according to the provisions of the Constitution, and that the legislature may have divided it among the counties, according to the valuation of property in such local jurisdictions, and had such evidence before them as guided their judgment in that particular.

Contracts between collectors of public money and their securities with the government, must be construed in reference to the terms used in them, and by the laws under which they were made.

#### APPEAL from *Montgomery County Court*.

This was an action of *Debt*, commenced on the 11th May 1838, by the State against the appellants, on their bond, dated 25th September 1835, subject to the following condition :

“The condition of the above obligations is such that if the above bound *Richard R. Waters*, do and shall well and faithfully execute his office as collector of *Montgomery* county, and the several duties required of him by law, and shall well and truly account for and pay to the justices of the levy court, or their order, the several sums of money which he shall receive and be answerable for by law, at such times as the law shall direct, then the above obligation to be void and of none effect, else to be and remain in full force and virtue in law.”



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The defendants, after craving *oyer* of the bond and condition, pleaded general performance by the said *Richard R. Waters* to the declaration of the State.

The State replied, that by an act of the General Assembly of the said State, passed at a session of Assembly, begun and held at the city of *Annapolis*, on Monday, the 20th day of December 1831, and ended on Wednesday, the 14th day of March 1832, entitled, “an act relating to people of color in this State,” it was, amongst other things, enacted, that for the purpose of raising a fund to pay the principal and interest of the loans authorised and required by said act, the levy courts or commissioners of the several counties of this State, were thereby authorised annually, during the continuance of the said act, to levy on the assessable property within their respective counties, clear of the expense of collection severally, the several sums of money in said act mentioned, and particularly on *Montgomery* county, the sum of \$340.66, which said amount or sum of \$340.66 was directed by said act to be collected annually in the same manner, and by the same collector, as county charges were collected; and the said State, by its said attorney, further saith, that by an act of the General Assembly of the said State, passed at a session of Assembly, begun and held at the city of *Annapolis*, on Monday, the 29th day of December 1834, and ended on Saturday, the 21st day of March 1835, entitled, “an act to provide more effectually for the levy and collection of the tax imposed for the purpose of colonizing the free people of color of this State, by an act, entitled, an act relating to people of color in this State, passed at December session 1831, ch. 281,” it was, amongst other things, enacted, that it should be, and was thereby made the absolute duty of the levy court or commissioners of the county, as the case may be, of the several counties of this State, to levy on the assessable property within their several and respective counties, during the continuance of the act of December session 1831, ch. 281, the several amounts by the eighth section of the said act, and the supplements thereto, authorising to be levied on the assessable property of each of said

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counties respectively, and the said levy courts and commissioners were thereby absolutely required; fully and in every respect to comply in future with terms, conditions and requirements of the eighth section of the aforesaid act, or as long as the same shall be and remain in force; and that it should be, and was thereby made the duty of the levy court or commissioners of the county of each and every county of this State, in which the said tax shall not have been heretofore regularly and fully levied, to levy when they shall respectively next levy the annual taxes or county levy for the county purposes of each of said respective counties, on the assessable property within each county, with interest respectively, the arrears of said tax then due by each of said counties respectively, agreeably to the provisions of the aforesaid eighth section of the aforesaid act, and to provide for the collection and payment over of the same to the Treasurer of the *Eastern or Western Shore*, as the case might be, in the same manner as is prescribed for in the eighth section of the act aforesaid; and that it should be the duty of the levy court or commissioners of the county, as the case might be, of each and every county in this State, to forward to the Treasurer of the *Western Shore*, within one month after they shall have respectively levied the tax or dues aforesaid, a certificate that the same has been duly levied and placed in the hands of the proper officer for collection, and that it should be the duty of the Treasurer of the *Western Shore*, and he was thereby authorized and required, if there should not have been received from the levy court or the commissioners of the county as the case might be, of each county in this State, a certificate of the levy of said tax having been made, according to the provisions of the said act, and of the eighth section of the act of eighteen hundred and thirty-one, chapter two hundred and eighty-one, entitled, "an act relating to the people of color of this State," to deduct on or before the first day of December, in each and every year, from that portion of the free school fund which might be payable to the county authorities of any and each county which may have failed to forward such certificates, and in which such tax shall not have been levied, an

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amount equal to the amount of said tax which may at the time be in arrears and not levied by each of said counties respectively, so in default and neglecting to comply with the provisions of the said act, as passed at the session of one thousand eight hundred and thirty-four, and the sum so deducted, the treasurer should, to the ordinary purposes of the treasury, to be reimbursed, however, to the free school fund of each county respectively, whenever the said tax should be thereafter duly levied, collected and paid into the treasury from the county so in default, and subjected to such deduction. And the said State, by its said attorney, in fact saith, that the levy court of *Montgomery* county did not levy on the assessable property within the said county, clear of the expense of collection, the said sum of three hundred and forty dollars and sixty-six cents, for three several years, that is to say, for the years one thousand eight hundred and thirty-two, one thousand eight hundred and thirty-three, and one thousand eight hundred and thirty-four, amounting in the whole to the principal sum of one thousand and twenty-one dollars and ninety-eight cents, clear of interest and the expense of collection; and that the said act, entitled "an act relating to the people of color in this State," was during the said several years in full force, and still continues so to be; and that the levy court of *Montgomery* county, did at the first meeting of the said court, after the enactment of the said act, passed at December session one thousand eight hundred and thirty-four, chapter one hundred and ninety-seven, for the purpose of levying the annual taxes of said county, that is to say, on the twenty-second day of September, one thousand eight hundred and thirty-five, did levy on the assessable property of said county, with interest, for each and several year, the arrears of said tax then due from said county, and did provide for the payment and collection of the same to the Treasurer of the *Western Shore*, according to law, and which arrears of tax, with the interest thereon, so remaining unpaid, and so ordered to be levied, amounted to the sum of one thousand one hundred and forty-four dollars and fifty-eight cents; and the said levy court, did at the same time, levy on the as-



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sessable property of said county the further sum of three hundred and forty dollars and sixty-six cents, due for the year one thousand eight hundred and thirty-five, clear of the expense of collection, according to the directions of the act of Assembly, passed at December session one thousand eight hundred and thirty-one, entitled "an act relating to people of color in this State;" and which said several sums of money amounted in the whole to the sum of fourteen hundred and eighty-five dollars and twenty-four cents; and which said last mentioned sum of money was to be collected and paid by the said *Richard*, who was then and there collector of the county aforesaid, to the Treasurer of the *Western Shore*, in the year one thousand eight hundred and thirty-five, according to the aforesaid acts of Assembly, and into whose hands, as collector aforesaid, the same was placed for collection; which said last mentioned sum of money, after the making the writing obligatory aforesaid, by virtue of the acts of Assembly aforesaid, and his office of collector aforesaid, the said *Richard* did, in the year one thousand eight hundred and thirty-five, at the county aforesaid, collect and receive, but the same the said *Richard* hath not rendered or paid, but the same to the said Treasurer of the *Western Shore* to render or pay, he has altogether refused, and still doth refuse; and this the said State, by its said attorney, is ready to verify; wherefore the said State prays, &c.

To this replication the appellants demurred generally, and the court having thereupon rendered judgment against them, they prosecuted this appeal.

The cause was argued before STEPHEN, ARCHER and CHAMBERS, J.

By CARTER and A. C. MAGRUDER for the appellants, and  
By BOYLE, D. A. G., for the State.

ARCHER, J., delivered the opinion of this court.

It is admitted by the demurrer in this case, that the collector has received all the taxes levied on the assessable property of *Montgomery* county, the non-payment of which furnishes

the subject of this suit. Having thus admitted the receipt of the money, the collector, who is in the light of an agent of the State, could not be heard to urge in his defence to a suit, that the money he had received, was on account of taxes which the legislature had no constitutional power to impose. The question of constitutional authority to levy the tax would properly arise between the collector and the person taxed, before payment or after payment, between the State and such person.

But supposing that it is entirely competent for all the defendants to urge the unconstitutionality of the law imposing these taxes, we will inquire whether they are obnoxious to the objection.

In the argument of the counsel of the appellant, it is contended, that the tax in controversy, is one laid for the support of government. If it were conceded that this was the fact, we should by no means be prepared to pronounce an opinion against it, as violating the 13th article of the bill of rights. Before such a judgment could be formed, it ought to appear clearly to us, that persons taxable, are not made to contribute according to their actual worth in real and personal property. We should be bound to presume, in the absence of evidence, that the tax imposed by the act of 1831, ch. 281, was laid according to the provisions of the constitution. The legislature may have divided this tax among the counties according to the valuation of property in such local jurisdictions, and we must suppose, in the present state of the record, had such evidence before them as guided their judgment in this particular. There is nothing on the face of the law which indicates, that the legislature adopted an arbitrary rule in the apportionment of the tax without regard to the constitutional provision on the subject.

But the tax, as we apprehend, has not been laid for the support of government, but with a political view, for the good government and benefit of the community. The act of 1831, ch. 281, it is true does not declare, that the tax is imposed with a political view, but it is quite apparent from its provisions and the general course of legislation on this subject, that

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such was the design of the legislature. The residence of free negroes in the State, who should thereafter be manumitted, was to be dependant upon evidences of extraordinary good conduct, and if such should not be furnished, provision is made in case of their refusal to emigrate, for their transportation beyond the limits of the State. It thus appears they are treated as a vicious or dangerous population, and to lessen the number, provision is made by the law for the removal of all by their consent, and for the transportation of such as might be thereafter liberated, who refused to go, or did not furnish the evidence required of their character. In the same spirit, laws have been passed to prevent their migration to this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness. Other laws might be adverted to, for the purpose of shewing the light in which this population has been regarded by the legislature, but we deem it unnecessary; presuming that enough has been said to lead us to the conclusion, that a law passed for the removal of a population viewed in such a light, has been enacted with a political view.

By the act of 1794, ch. 53, a bond is required to be taken from the collector of the county charge, the condition of which, as prescribed by the law is as follows:

“That if the above bound ——— shall well and faithfully execute his office, and the several duties required of him by law, and shall well and truly *account for and pay to the justices of the levy court, or their order*, the several sums of money which he shall receive or be accountable for by law, at such time as the law shall direct, then the above obligation shall be void.”

The bond upon which this suit has been instituted, conforms in all respects, to the bond required to be taken by the act of 1794, ch. 53, the condition of which we have just referred to.

By the act of 1831, ch. 281, sec. 8, it is declared, that the sums levied on the counties for paying the principal and interest of the sum by that act directed to be borrowed, for removing the free people of color, shall be collected in the same



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manner, and by the same collectors as county charges are collected, and *directs bond to be taken with sufficient security from such collector, "for the faithful collection and payment of the "money in the treasury of the Eastern and Western Shore, as "the case may be, at the time of paying other public monies to "and for the use of the State."*

If by the act of 1831, ch. 281, a bond had not been directed to be taken of the collector, to pay the tax to be collected under its provisions into the treasury, the words of the condition of the bond taken under the act of 1794, ch. 53, would probably have been sufficient to have entitled the State to a recovery for the taxes now in controversy.

But the contracts of the collectors and their securities, with the government, must be construed in reference to the terms used in such contracts, and by the laws under which they were made. As the law of 1831, ch. 281, has required *another bond* to be given payable to the treasury, we believe the legislature never looked to the bond given under the act of 1794, ch. 53, as furnishing any security for the collection of what is commonly called the colonization tax, directed to be levied by the law of 1831, ch. 281. The parties must, in this view of the law, be considered as not contracting in reference to the latter law, or as contemplating any responsibility for the collection of that tax.

It is also worthy of remark, that the condition of the bonds required to be taken under these laws, demand payment of the sums collected to different officers. By the first, payment is to be made to the justices of the levy court, by the latter to the treasurer. From the above considerations, we are satisfied, that no recovery can be had on the bond in suit in this case, for the tax now in controversy.

We presume as the law directs, that a bond has been taken under the act of 1831, ch. 281, which could alone be sued on. If no such bond has been taken, the State is without remedy against the sureties on this bond.

JUDGMENT REVERSED.

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Howard *vs.* Wilmington and Sus. Rail Road Co.—1843.

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S. AND H. HOWARD *vs.* THE WILMINGTON AND SUSQUEHANNA RAIL ROAD COMPANY.—*December 1843.*

Where the parties entered into a contract, to construct a road between two given points, which from its nature was an entire indivisible contract, and afterwards entered into another agreement for the performance of the same work, either in part, or in the whole, at a different price, the latter is an extinguishment of the first contract.

Where an entire contract is extinguished in part or in the whole, an action on the contract itself cannot be sustained.

Where an entire contract is extinguished in part or in whole, by the making a new one for a part of the subject matter of the first, it is not sufficient for the plaintiff, who seeks to recover damages for a violation of the original agreement, and to repel the legal presumption of a merger in such a case, to aver that *he* entered into the *second* contract with an express understanding on *his* part, and so declared to the defendants at the time, that the *first* contract was not waived, except so far as it was covered by the second; but the fact of assent by the other party should have been also averred.

The legal presumption of a merger, as where two contracts are successively entered into upon the same subject matter, is not to be repelled by evidence of the silence of one party, but assent of parties must be averred and proved, to prevent such presumption from operating.

Whether parol evidence of such assent would be received to vary the effect of the second contract upon the first, both being in writing. *QUIRE?*

Where a contract has been vacated and rendered legally inoperative in part by the consent of the plaintiff, no action can be sustained upon it for the recovery of damages on the ground, that the plaintiff was prevented by the wrongful act of the defendant from fulfilling it.

Where an original contract has been rescinded by the parties after it has been performed in part, either by a waiver of the performance of the balance of the contract, or entering into a new one so inconsistent with the first as to be wholly irreconcilable with it, in such case a recovery may be had for the performance on a general count; but not by declaring on the contract itself.

It is a rule in pleading, that each party tacitly admits all such traversable allegations on the opposite side, as he does not traverse.

In July 1836, the plaintiff contracted with the defendant, to construct a rail road according to certain specifications, to complete one mile by the 15th October, and the residue by the 1st of November following. The defendant agreed to pay in monthly payments, according to the measurement and valuation of his engineer, retaining from each payment fifteen per cent., until the final completion of the work, and was authorised in certain cases to declare the contract forfeited, from which the plaintiff should have no appeal. The plaintiff averred, that he diligently prosecuted his work,

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&c., until the 17th September, when he was prevented by a writ of injunction, served on him until the 30th October, from going on; that the engineer of the defendant had not complied with his duty, stating the particulars of his breach thereof under the contract; that he proceeded after the 1st November, under the orders of the defendant to prosecute the work until the 19th January, and that the work done under the agreement in December 1836, was estimated by defendant's engineers, at, &c., which sum not being paid, the defendant on the 19th January, fraudulently, and for the illegal purpose of imposing better terms on the plaintiff, &c., declared the contract forfeited. The defendant pleaded, that the contingencies (stating them,) on which the right to forfeit the contract depended, had occurred, and that on the 19th January, he had in virtue of his reserved power, forfeited the agreement. To this the plaintiff demurred generally.

HELD:

1. That the breaches of contract, not denied by the plea, were admitted.
2. That the illegal and fraudulent purpose, for which the contract was alleged to have been annulled, was also admitted.
3. That the annulling the contract under the circumstances, was a breach thereof.

Where a contract is broken, the plaintiff will be entitled to some damages, whether they be stated or not.

Damages are implied from a breach of a contract.

Wherever damages necessarily and naturally arise from the breach complained of, and may therefore be implied, they need not be stated; otherwise they must, to prevent surprise.

Where a breach of contract is relied on, from which damages necessarily and naturally arise, the general conclusion, that the plaintiff has sustained damage in, &c., is sufficient to all the counts in the declaration, and obviates the necessity of charging damages generally in each one of them.

### APPEAL from Cecil County Court.

This was an action of *assumpsit*, commenced on the 21st March 1837, by the appellants against the appellees.

The plaintiff's declaration contained nine counts.

The defendant pleaded nine pleas, viz:

1st and 2nd plea, *non-assumpsit* and payment to all the counts on which issues were joined.

3rd plea was to the 4th count.

4th plea to the 5th count.

5th plea to the 6th count.

6th plea to the 8th count.

7th plea to the 1st count.

8th plea to the 2nd count.



9th plea to the 3rd count.

To these seven last pleas, the plaintiffs demurred generally.

The county court overruled the demurrers, and decided the pleas to be sufficient in bar of the action.

At the trial in this court the parties agreed, that the *general counts* in the plaintiff's declaration should be abandoned and stricken therefrom; that the judgment for the defendants should be regarded and treated as a general judgment, and that the case should be argued and heard upon the demurrers to the pleas filed to the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th and 9th counts of the plaintiff's declaration.

The plaintiffs declared as follows:

1ST COUNT. For that whereas the said plaintiffs heretofore, were employed in executing work and labor upon rail roads and canals as their proper business, &c., and whilst they were so employed, to wit, on the 1st October 1835, at, &c., at the request of the defendants, they the said plaintiffs, did make and enter into a contract or agreement with the said W. and S. R. R. Co., to graduate the W. and S. rail road between *Charlestown and Havre De Grace*, for twenty-four cents per cubic yard for excavation, grubbing and purchasing land for embankment across *Principio Valley* included. The plaintiffs to purchase land to supply material for embankment when it could not be supplied from the road, without making a haul of less than eleven hundred feet; all rock or other material that could not be removed without blasting, to be left to the superintending agent, and if said agent and plaintiffs could not agree as to the price, the agent might re-let this part of the work to any other person, as specified in the former specifications of said company of the first and second divisions. And the said plaintiffs aver, that after the making the contract aforesaid, and in consideration thereof, to wit, on, &c., at, &c., and also in consideration, that the said plaintiffs then and there undertook and faithfully promised the defendants to fulfil, perform and keep the said contracts, all things on said plaintiffs part to be performed, fulfilled and kept. They the said defendants, undertook and faithfully promised the said plaintiffs to perform, ful-

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fil and keep the said contract in all things on defendants part, to be performed, fulfilled and kept, to wit, on, &c., at, &c. And the said plaintiffs declare, that they have always since the making of the said contract, been able, ready and willing to perform, fulfil and keep all things in said contract specified on their part to be performed, fulfilled and kept, according to the true intent and meaning of the said contract, of which the said defendants had notice, to wit, on, &c., and often afterwards at, &c. And the said plaintiffs further say, that in consideration of the contract aforesaid, and of the promises and undertakings of the said defendants aforesaid, and for the purpose of performing all things in said contract on the part of said plaintiffs to be performed, they did advertise, proclaim and publicly declare, that they would employ and hire all such laborers as should apply to said plaintiffs to be hired for a reasonable compensation, to work upon the rail road in the contract stated, between *Charlestown* and *Havre De Grace*, in consequence whereof the plaintiffs were applied to by a great number of laborers to be hired, to wit, upon said road, and said plaintiffs did engage, hire, and pay a much larger number of laborers than they at that time had use for, or could work to advantage on the other job of work they were then engaged in completing, for the purpose of retaining said laborers in plaintiffs employment, with their carts, oxen and horses, so that the plaintiffs might be ready and prepared to commence and vigorously prosecute to its completion the graduation of the rail road in the agreement specified, whenever the said defendants were ready, and should give notice to the plaintiffs to begin to work upon it; and the said plaintiffs also aver, that they employed a number of boarding masters, to board the laborers to be employed in working on the said rail road in said agreement specified, many of whom purchased and provided large supplies of food, bedding and cooking utensils; and the plaintiffs engaged the services of a number of managers to superintend the work of the laborers, all of whom were retained by the said plaintiffs at great expense, until said defendants were ready for plaintiffs to begin grading the rail road between *Charlestown* and *Havre*

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*De Grace*, according to the agreement aforesaid; and the said plaintiffs also purchased a great number of implements and engines, and one hundred dozen shovels for the purpose of fulfilling their agreement aforesaid, and were put to great expense, inconvenience, trouble and delay in and about satisfying, retaining and compensating the laborers, workmen and others whom they had engaged, retained and hired, for the purpose of fulfilling their agreement as aforesaid. And said plaintiffs further declare, that a great number of laborers, workmen and others they had engaged and hired for the purpose of fulfilling the agreement aforesaid, moved upon the line of the rail road between *Charlestown* and the *Susquehanna River*, and there constructed their houses or shantees, to be ready to commence their labors on said rail road, according to the agreement they had entered into as aforesaid, with the said plaintiffs; and the said plaintiffs moved and transported all their necessary engines, implements, machinery, stores and other effects from the *Baltimore* and *Port Deposit* rail road to *French Town* in *Cecil county*, for the purpose of making ready to use the same on that part of the *Wilmington* and *Susquehanna Rail Road* in said agreement mentioned. And the said plaintiffs say, they were then and there able, ready and willing to commence and prosecute the work in the said agreement mentioned, to its completion, according to said agreement; and said plaintiffs further aver, *that they were hindered and prevented by the making of the agreement aforesaid, from attending to and bidding for the lettings and contracts upon other rail roads and canals in various other places*, which they otherwise might and would have attended to and bid for, and engaged in, and thereby lost the opportunity of making large gains and profits from the same; and the plaintiffs further aver, that although after the time of making the agreement aforesaid, to wit, on the 12th July 1836, *they entered into another contract or agreement in writing* with said defendants, to do all the grading of that part of section No. 9 of the same rail road, mentioned in the first agreement, and which lies in the state and county aforesaid, and which extends from station No. 191 to the end of the piers and wharf



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in the river *Susquehanna* opposite *Havre De Grace*, being a portion of the same rail road included in the first agreement above stated. Nevertheless, the said second agreement to grade section No. 9 from station No. 191 to the river as aforesaid, was made and entered into, with the expressed determination and understanding on the part of the plaintiffs, and was so declared and expressed by the plaintiffs to the said defendants, at and before the time of entering into the said second agreement, that by entering into the said second agreement, they the said plaintiffs, *did not waive, abandon or rescind the said first agreement* so made as aforesaid, but that notwithstanding the said second agreement, the said plaintiffs held and considered the said defendants liable and responsible to them for all the loss, injury and inconvenience the said plaintiffs had suffered or been put to by the non-fulfilment on the part of the said defendants, of all the matters and things in the said first agreement by them to be performed and observed, according to the true intent and meaning of the said first agreement, except only insomuch as said first agreement refers to that part of the said rail road that is mentioned in said agreement, of all which premises the said defendants had notice, to wit, at, &c. Yet the said plaintiffs say, that the defendants well knowing the premises, but contriving and wrongfully intending, artfully and deceitfully to defraud and injure the said plaintiffs, to wit, on the 1st December 1835, at, &c., wholly refused and declined to observe, perform and fulfil any of the matters and things in the said *first agreement*, specified on their part to be performed and fulfilled, and refused and declined to perform any of the matters and things in their said promise and undertaking, but thereby craftily and subtly deceived the said plaintiffs in this, videlicet, that the said defendants took the work of grading the rail road in the first agreement mentioned out of the hands of the said plaintiffs, by letting the same to other contractors and persons without the consent of and against the will of said plaintiffs; and said defendants further disregarding the said first agreement, and their promises and undertakings afterwards, to wit, on the 1st of December 1835, at the county

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aforesaid, did not, nor would permit or suffer the plaintiffs to begin or proceed to complete the work on the rail road in the first mentioned agreement specified, and then and there wholly hindered and prevented them from so doing, and then and there wrongfully and unjustly discharged the plaintiffs from any performance or completion of their first said agreement and promise and undertaking, whereby the plaintiffs have been deprived of all the profits, gains and advantages, which they otherwise might, and would have derived and acquired from the completion of the work in the first agreement mentioned scilicet at, &c.

2ND COUNT. For that whereas the said plaintiffs were heretofore engaged in executing jobs of work and labor upon rail roads and canals as their proper business, &c., and the said W. and S. R. R. Co. were incorporated for the purpose, amongst other things, of constructing a rail road in the county aforesaid, and were bound by their charter to complete the construction of the said rail road in a given time mentioned therein, on pain of forfeiting their franchise, and said company were empowered amongst other things, to enter into contracts with laborers and others, for the purpose of constructing said road, and the said defendants scilicet on the 1st of October 1835, at, &c., in consideration, that the plaintiffs at the special instance and request of the defendants, would undertake, promise and agree to grade all that portion of the W. and S. R. R. that lies betwixt *Charlestown* and *Havre De Grace*, or that was there laid out or contemplated to be made there in *Cecil* county, and would agree to execute the whole in a workmanlike manner, and according to the directions of the engineer, the defendants undertook and promised the plaintiffs, that they would have the privilege of wasting the material of the cut, and of purchasing ground to supply the embankment over *Principio Valley* when it could not be supplied from the road, without making a haul of less than eleven hundred feet; and the defendants undertook, and then and there promised the said plaintiffs to permit and suffer them to grade the portion of the rail road that lies between *Charlestown* and the *Susquehanna* river,

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and to pay the said plaintiffs twenty-four cents per cubic yard for common excavation, all rock excavated to be paid for at the estimate of the engineer; and the said plaintiffs aver, that they, confiding in the promise and undertaking of the said defendants, did undertake, promise and agree, to and with said defendants to grade all that portion of the W. and S. R. R. that lies between *Charlestown* and *Havre De Grace* in a workmanlike manner, according to the directions of the engineer, afterwards, to wit, on 1st October 1835, at, &c., on the day and year last aforesaid, and divers days and times thereafter, did provide the necessary laborers, means and instruments for the purpose of grading the road as aforesaid, and were put to great trouble and expense, in and by engaging a great number of superintendants and laborers, and retaining them until the said defendants should be ready for plaintiffs to begin grading said rail road, and by purchasing a great number of shovels and other implements, and by moving and transporting all their necessary implements, machinery and stores from the *Baltimore* and *Port Deposit* rail road to *French Town*, for the purpose of using them in and about grading that portion of said rail road above mentioned; and the said plaintiffs further aver, that they have been able and willing ever since the making of the said promise and undertaking of the defendants aforesaid, (until as hereinafter stated they were prevented from so doing by said defendants,) to begin and execute the grading of that portion of said rail road that lies betwixt *Charlestown* and *Havre De Grace*, in a workmanlike manner, and according to the directions of the engineer, whereof the said defendants then and there had notice at *Cecil* county aforesaid. Yet the said defendants not regarding their said promise and undertaking in manner aforesaid made, but contriving and fraudulently intending to deceive and injure the said plaintiffs in this behalf, did not, nor would, permit or suffer the said plaintiffs to begin to grade the said portion of rail road, nor to complete the grading of the same, but wholly refused and neglected so to do, and on the contrary thereof, they the said defendants, after the making of their said promise and undertaking, and whilst the



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said plaintiffs were able and willing to begin and execute the grading of that portion of the rail road that lies betwixt *Charlestown* and *Havre De Grace* in a workmanlike manner, according to the directions of the engineer, to wit, on 1st of December 1835, at, &c., wrongfully and unjustly, and without the license and consent, and against the will of plaintiffs, they the said defendants, let out the said portion of the rail road, and contracted for its graduation with other persons, and caused it to be graded by them, whereby the said plaintiffs were hindered and prevented from grading or beginning to grade said portion of the rail road aforesaid, nor did the said defendants pay the said plaintiffs twenty-four cents per cubic yard for the common excavation on said portions of rail road nor any part thereof, nor did they pay the said plaintiffs for the rock excavated according to the estimate of the engineer, although often requested so to do, but have hitherto wholly refused and neglected, and still refuse. And the said plaintiffs also aver, that the said defendants wrongfully and unjustly discharged the plaintiffs from the performance or completion of their said promise and undertaking, whereby the said plaintiffs not only lost and were deprived of all the profits, benefits and gains that might and would have accrued to them from grading the said portion of the rail road betwixt *Charlestown* and the *Susquehanna* river, but also suffered and were put to great loss and expense of time and money, in and about preparing to execute the grading of said rail road, and prevented from entering into contracts and engagements for jobs of work on other rail roads and canals, amounting in the whole to a large sum of money, at, &c.

3RD COUNT. And whereas also heretofore, that is to say, on the 1st October 1835, at, &c., in consideration that the said plaintiffs, at the special instance and request of the defendants, would get ready and be prepared in a reasonable time, then next ensuing the day and year last aforesaid, with laborers, implements, machinery, horses and carts, to grade a certain portion of a rail road, which the defendants were then engaged in constructing, the defendants then and there undertook,

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and faithfully promised the plaintiffs to suffer and permit them to grade all that portion of the W. and S. R. R.; (or by whatever other name the same may be called,) that they were engaged in constructing, or intended to construct betwixt *Charlestown* and the *Susquehanna* river, and to give the plaintiffs the privilege of wasting all material of the cut not required for the embankments, and permit them to purchase earth to supply the embankments over *Principio Valley*, where it could not be supplied from the road without making a haul of less than eleven hundred feet, and if the plaintiffs would execute the whole grading in a workmanlike manner, and according to the directions of the engineer, undertook and promised to pay them twenty-four cents per cubic yard for common excavation, and to pay the plaintiffs for all rock excavated at the estimate of the engineer. And the said plaintiffs aver, that they, confiding in the said promise and undertaking of the defendants, afterwards, at, &c., on, &c., in the county aforesaid, and on divers days and times thereafter, for the purpose of being ready and prepared with laborers, implements, machinery, horses and carts to grade the portion of the said rail road above mentioned, did engage and hire a great number of laborers, and horses and carts, all of which were kept and retained by plaintiffs in a state of readiness and at great expense, waiting for a long space of time for defendants to permit and suffer the plaintiffs to begin the grading of the portion of the rail road above specified, and said plaintiffs purchased a great number of necessary implements and machines, and one hundred dozen shovels, for the purpose of being ready to grade said rail road, and were put to great expense and trouble in and about moving and transporting their engines, machinery and other effects from the *Baltimore* and *Port Deposit* rail road to *French Town* in *Cecil* county, for the purpose of being ready and prepared to commence grading the said portion of said rail road above mentioned, and to proceed with the completion of the same in a workmanlike manner, according to the directions of the engineer, so soon as the defendant might or should permit, or suffer the plaintiffs to begin to grade the same; and the said

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plaintiffs further aver, that they were hindered and prevented by the promise and undertaking of said defendants, made in manner and form as above stated, from undertaking and engaging in jobs of work on other rail roads and canals, and lost thereby the opportunity of making large gains and profits from the same, of all which premises the defendants on the day and year aforesaid, at the county aforesaid, had notice. And the said plaintiffs aver, that from the time of making the said promise and undertaking of the said defendants, the plaintiffs were ready and willing in a reasonable time, and for a long space of time, scilicet, from the time of making said promise and undertaking until the 1st December 1835, at the county aforesaid, and offered to begin to grade all that portion of the rail road above mentioned, and to complete the same in a workmanlike manner, according to the directions of the engineer, in a reasonable time, of all which premises the defendants at, &c., on, &c., and often afterwards, had notice. Yet the said plaintiffs in fact say, that the defendants, contriving and wrongfully intending to injure the said plaintiffs, did not nor would perform their said promise and undertaking in form aforesaid made, but totally disregarding the same, did not nor would permit or suffer the said plaintiffs to begin to grade that portion of the rail road above mentioned, betwixt *Charlestown* and the *Susquehanna* river, but wholly neglected and refused so to do, and on the contrary thereof, they the said defendants, after the making of their said promise and undertaking, and whilst the said plaintiffs were ready and willing to begin and complete the grading of that part of the rail road above specified, in a workmanlike manner, and according to the directions of the engineer, to wit, on the 1st December 1835, at *Cecil* county aforesaid, wrongfully and unjustly, and without the license or consent of the plaintiffs, and against their will, contracted for the grading of the above stated portion of rail road betwixt *Charlestown* and the *Susquehanna* river, with other persons than the plaintiffs, and caused the said portion of rail road to be graded by them, whereby the plaintiffs were hindered and prevented from beginning to grade said portion of rail road, and were



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wrongfully and unjustly, and against their will, discharged by the defendants from beginning and completing the grading of the said rail road betwixt *Charlestown* and the *Susquehanna* river, in a workmanlike manner, and according to the directions of the engineer, nor did the said defendants pay the plaintiffs twenty-four cents per cubic yard for the common excavation on said portion of the rail road, nor any part thereof, nor did said defendants pay the plaintiffs for the rock excavated according to the estimate of the engineer, although often requested so to do, to wit, at the county aforesaid; but to pay the same or any part thereof, the said defendants have hitherto wholly refused, and still do refuse, whereby the said plaintiffs have been deprived of all the profits, benefits and gains, which otherwise might and would have accrued to them from the completion of grading of the said rail road betwixt *Charlestown* and the *Susquehanna* river, to wit, at, &c.

4TH COUNT. And the said plaintiffs further complain, for that whereas the said plaintiffs heretofore, to wit, on the 12th of July 1836, at *Wilmington*, that is to say, at, &c., made another agreement in writing with the said W. and S. R. R. Co., and amongst other things in said agreement specified, to do all the grading of that part of sect. No. 9, in the *State of Maryland*, of the W. and S. R. R., which extends from station No. 191 to the end of the piers and wharf in the river *Susquehanna*, opposite *Havre De Grace*, according to the directions of the engineer and the specifications in said agreement, for the sum of *twenty-six* cents per cubic yard for every cubic yard excavated, the said section to be completed in a workmanlike manner, viz: one mile from station No. 191, by the 15th of October 1836, and the residue by the first day of November ensuing, which said agreement and specification, and all things therein contained, is of the tenor and in the words following, to wit:

“*Agreement between S. H. and H. H. of the first part, and the W. and S. R. R. Co. of the second part.*”

“The party of the *first* part, in consideration of the matters hereinafter referred to and set out, covenants and agrees to and

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with the party of the *second* part, to furnish and deliver at the proper cost of the said party of the first part, the building materials, which are described in the annexed schedule to the said party of the second part, together with the necessary workmanship and labor on said rail road, and at such times, and in such quantities as the party of the second part shall require and designate; and faithfully, diligently and in a good and workmanlike manner, to do, execute and perform the office, work and labor in the said schedule mentioned.

“And the party of the second part, in consideration of the premises, covenants and agrees to pay the party to the first part, the sums and prices in the said schedule mentioned, on or before the first day of November next, or at such other times and in such manner as therein described. Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or negligent, then and in such case he shall be authorised to declare the contract forfeited, and thereupon the same shall become null, and the party of the first part shall have no appeal from the opinion and decision aforesaid, and he hereby releases all right to except or to question the same in any place or under any circumstances whatever. But the party of the first part shall still remain liable to the party of the second part for the damages occasioned to him by the said non-compliance, irregularity or negligence: and provided also, that in order to the faithful and punctual performance of the covenants above made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of this contract, the said party of the second part shall, notwithstanding the provision in the annexed schedule, be authorized to retain in their hands until the completion of the contract, fifteen per cent. of the moneys at any time due to the said parties of the first part. Thus covenanted and agreed by the said parties this 12th day of July 1836, as witness their seals, &c.

SEBRE HOWARD, (Seal.)

JAMES CANBY, Pres't, (Seal.)

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Signed, sealed and delivered in the presence of —. [The date above changed to 1st of November, and in the schedule the price changed to twenty-six cents, and an extra price for extra haul inserted, and the work fixed to be done by Nov. 1st 1836, before signing.]

WM. P. BROBSON.

*Schedule referred to above.*

The above named S. H. and H. H. contract to do all the grading of that part of section No. 9 in the *State of Maryland* of the W. and S. rail road, which extends from station No. 191 to the end of the piers and wharf in the river *Susquehanna* opposite *Havre De Grace*, according to the directions of the engineer, and according to the specifications hereto annexed, for the sum of twenty-six cents per cubic yard, for every cubic yard excavated, the said section to be completed in a workmanlike manner, viz: one mile from station No. 191 by October 15th 1836, and the residue by November 1st ensuing. They also contract to make the embankment at the river from the excavation of the road, provided the haul shall not exceed a distance of eight hundred feet from the eastern termination of the said embankment, all other portion of the hauling together, not to exceed an average of eight hundred feet, and for any distance exceeding the said average, the price is to be one and a half cents per cubic yard for each hundred feet haul. The party of the second part contracts to pay to the said *Sebre Howard* and *Hiram Howard*, the said sum of twenty-six cents per cubic yard, *in monthly payments, according to the measurement and valuation of the engineer*, retaining from each payment fifteen per cent. until the final completion of the work. If any additional work, in consequence of water, grubbing or hard material is required, on the side ditch or ditches through *Cowden's* woods, the same is to be decided by the engineer, as in case of rock, &c., &c.

*Specification of the manner of grading the Wilmington and Susquehanna Rail Road.*

Before commencing any excavation or embankment the natural sod must be removed to a depth of three inches from the whole surface occupied by the same, for the purpose of after-



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wards sodding the slopes thereof, and all stumps, trees, bushes, &c., entirely removed from the line of the road, as directed by the engineer. In cases of embankment, a grip must be cut about one foot deep for footing the slopes and preventing them from slipping, the embankments must be very carefully carried up in layers of about one foot in thickness, laid in a hollow form, and in so doing all hauling or wheeling, whether loaded or empty, must be done over the same, the slopes of the excavations and embankments will be one and half horizontal to one perpendicular, except where otherwise ordered by the engineer, and are to be sodded with the sods removed from the original surface; side ditches and back drains must be cut whenever ordered by the engineer at the same price as the common excavation; the side ditches will, on an average, be about nine feet wide on top and about two feet deep, and will extend along a great portion of the road. In most places where embankments are to be made, the cutting of the adjacent parts is about sufficient for their formation, and as the contractor is supposed to have examined the ground and profiles, and to have formed his estimates accordingly, no allowance will be made for extra hauling; where more earth is required than is procured from the excavation, the contractor shall take it from such places as the engineer may direct, the cost per cubic yard being the same as the other parts. Where there is any earth from the excavations more than is required from the embankments, it shall be placed where ordered by the engineer. All the estimates will be made by measuring the excavations only. Loose rock, boulders, iron, stone or other pebbles of a less weight than one-fourth of a ton, are to be removed by the contractor at the same price as the common excavation, but in cases of larger size, or for blasting, the price shall be a matter of special agreement between the contractor and engineer; and if the former should not be willing to execute for what appears to the engineer a fair price, the latter may put the same into other hands. No extra allowance will be allowed for cutting down trees, grubbing, bailing or other accidental expenses. Measurements and estimates will be taken about

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once a month, and full payment will be made by the directors after deducting 15 per cent., which deduction on each estimate will be retained until the entire contract is completed, which must be on or before —. It is to be distinctly understood by the contractors that the use of ardent spirits among the workmen is strictly forbidden.

WILLIAM STRICKLAND,

*Chief Engineer of the Wil. and Sus. R. R.*

And thereupon afterwards, to wit, on the said 12th of July 1836, at the county aforesaid, in consideration that the plaintiffs at the special instance and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to perform and fulfil all things in said agreement on said plaintiffs behalf to be performed and fulfilled, they the said defendants undertook and faithfully promised the said plaintiffs to perform and fulfil all things in said agreement on the defendants part to be performed and fulfilled; and said plaintiffs declare, that soon after the making of the said agreement, for the purpose and with the intent of fulfilling and performing all things in said agreement on their part to be performed and fulfilled, to wit, on the 23rd July 1836, at the county aforesaid, they promptly and diligently commenced doing and executing the grading of that part of section No. 9 in said agreement set out and contracted for by them, and were fully prepared with laborers, means and instruments to execute the work in the manner and in the time specified in said agreement, for the completion of the same, and so continued actively and diligently to prosecute and do the work of grading, and all other work contracted for in said agreement, until the 17th of September 1836, when said plaintiffs were served by the sheriff of Cecil county with a writ of injunction, issued from the High Court of Chancery, sealed with the seal of the State of Maryland, and signed by the honorable Theodorick Bland, Chancellor, which said injunction was of the tenor following, to wit, which said writ after its formal part proceeded as follows:

We therefore do hereby command and strictly enjoin you the said Delaware and Maryland rail road company, your president and directors, agents and servants, that from henceforth you,

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and each and every one of you, do absolutely forbear, desist, surcease and refrain altogether from making, constructing or completing the said wharf, contemplated and laid out by you the said *Delaware* and *Maryland* rail road company, from the lot leased by the father of the said complainant to *Martha Coffield*, on the *Susquehanna* river, and from all and every act whatsoever towards the making, completing or using in any manner the said wharf or any part thereof, and from placing any stone, gravel, earth, logs, timber, boards, or any other substance or material on said wharf, or any part thereof, or in the said river, and from driving down piles or timbers in said river, and from any other and further act touching or affecting the said road commenced by you from the *Cecil Shore* of the *Susquehanna* river, until the further order of the court of chancery. Witness the honorable *Theodorick Bland, esquire*, Chancellor, this 13th of September 1836.

Test,—RAMSEY WATERS, *Reg. Cur. Can.*

*In Chancery, 13th Sept. 1836.* Ordered, that writs of subpoena and injunction issue as prayed by the foregoing bill of complaint; and it is further ordered, that at any time after the said defendants have filed their answers, the court will hear a motion to dissolve the said injunction, provided the said defendants give to the said plaintiffs, or their solicitor, ten days notice thereof, and the register is directed to endorse a copy of this order on the said writ of injunction, that it may be served therewith on the said defendants.

THEODORICK BLAND, Ch'r.

On which injunction was thus endorsed: Injoined—*Noble Pennington, Sh'ff.*

True copy,

Test,—RAMSEY WATERS, *Reg. Cur. Can.*

By means of which injunction the plaintiffs were prevented and delayed from executing the work in said agreement, contracted to be performed and done in the time specified in said agreement, and were enjoined and prohibited from working upon that part of the rail road in said injunction mentioned, being part of sec. No. 9 in said agreement mentioned, for a long space of time, to wit, from the said 17th of September,



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the day on which said injunction was served, until the 30th of October in the same year, being the day when said injunction was appealed from and appeal bonds filed, whereby said plaintiffs suffered great delay, inconvenience and expense in conducting and performing the grading of the said rail road in said agreement mentioned, for and during the whole time the said injunction remained and continued in force; and said plaintiffs declare that at the time of making of said agreement, the ground upon which the said rail road was to be graded was laid down on the profile prepared by the engineer, and marked out by stakes to shew the width of the rail road track at the surface of the earth, and also the width of the embankment, (as referred to in the specification in said agreement,) all of which were examined by the said plaintiffs at the request of the defendants before they made and entered into said agreement. And said plaintiffs aver, that although great part of the embankment to be made was staked out and laid down in the profile to be only fifteen feet wide at the top, the engineer ordered and directed the plaintiffs to make the embankment thirty feet wide at the top along a great portion of the railroad in said agreement mentioned. And said plaintiffs further aver, that whilst they were executing the work according to the profile as aforesaid, the engineer of the defendants ordered and directed the plaintiffs to grade the rail road — feet deeper than it was laid down on said profile, whereby said plaintiffs were greatly delayed, and were prevented from completing the first mile of the road before the 20th of October 1836, which was then completed and finished according to and under the directions of the engineer aforesaid. And said plaintiffs further aver, that notwithstanding the said injunction, and all the other actings and doings of the said defendants in the premises as aforesaid, *they did with great diligence and care, with all proper and necessary means, and without any unnecessary or unavoidable delay, proceed with and continue to execute the work in said agreement specified, according to the terms and condition thereof, in a faithful and workmanlike manner, and did observe, fulfil and keep all the terms and conditions of said agreement on their part to be observed and kept,*

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or except so far only as they were prevented from finishing the work in the time specified in said agreement by the injunction aforesaid, and the orders, interference and hindrance of the said defendants, and that after the said 15th of October 1836, and the said 1st of November, the time fixed for the completion of said work in said agreement, they did proceed under the orders of the engineer aforesaid, and at the request and by the permission of the said defendants, and by the authority and virtue of the agreement aforesaid, to execute the work in said agreement mentioned, according to the terms and conditions thereof, and performed and fulfilled every thing on their part by said agreement to be done and performed, from the time of the making said agreement until the 19th of January 1837; and said plaintiffs declare, that the engineer of said company estimated the work of said plaintiffs done under said agreement in the month of December 1836, according to measurement and valuation, at the sum of three thousand six hundred and some dollars, before deducting the fifteen per cent. specified in said agreement to be retained by said company until the final completion of said work; yet the said defendants disregarding the terms of said agreement, although often requested so to do, at, &c., aforesaid, have not yet paid the said sum of \$3,600, after deducting the fifteen per cent. aforesaid, nor any part of the said fifteen per cent. so retained as aforesaid, *but contriving and intending to defraud and injure said plaintiffs, after paying them one thousand dollars, a part of said estimate, refused and still do refuse to pay the balance.* And said plaintiffs further aver, that according to the terms of said agreement, when there was any earth from the excavations more than was required for the embankments, it was to be placed where ordered by the engineer, *yet the defendants well knowing the premises, on the 19th of January 1837, at Wilmington, that is to say at, &c., notwithstanding the request and demand of the plaintiffs in this behalf, but intending and contriving artfully and deceitfully to defraud and injure the said plaintiffs, refused to permit the engineer to point out or order any where to deposit the earth from the excavation, although there was a large quantity of earth to be removed from the ex-*

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*cavations more than was required for the embankments, and also refused to pay said plaintiffs one and a half cents per cubic yard for each hundred feet haul over eight hundred feet in distance, as by the terms of said agreement they were bound and required to do, but said defendants artfully and fraudulently contriving to impose upon said plaintiffs, by forcing them to submit to an alteration of the terms of said agreement, or to be deprived of all the benefits and advantages to which they were entitled to under the same, declared the said agreement to be forfeited, and refused to comply with the terms and conditions on their part to be observed, and fulfilled and kept, whereby said plaintiffs were suddenly thrown out of employment, and unjustly and fraudulently prevented completing the work contracted to be done by them as aforesaid, and have lost all gains and profits which they might and would otherwise have made and acquired from finishing the work according to said agreement.*

5TH COUNT. And the said plaintiffs further complain, for that whereas after the said 15th October, and the said 1st November, the times fixed for the completion of the said work and labor designated in the said agreement, on the 12th July 1836, stated in the fourth count of this nar, the said plaintiffs at the special instance and request of the said defendants, to wit, on the 2nd November 1836, at *Wilmington*, to wit, at, &c., aforesaid, undertook and agreed with the said defendants to finish and complete all and singular the work and labor in the agreement aforesaid, which then remained unfinished and incomplete, at the prices and in the manner stipulated in the said agreement, and to do and perform the same within a reasonable time, and that the said defendants in consideration thereof, promised and agreed to pay the said plaintiffs all that was then due them, and also for the said work and labor the prices stipulated in the said agreement, and to do and perform all and singular the covenants on the part of the said defendants to be done, as mentioned in the said agreement; and the plaintiffs further aver, that in consideration thereof, they the said plaintiffs did proceed diligently and faithfully with the said work and labor at the said instance and request of said defendants, and that



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while they were so employed faithfully and diligently executing the said work and labor, and after the same had progressed considerably, the said defendants refused to do and perform the covenants and agreements on their part to be done and performed, and that said defendants, and their agents and engineers, refused to suffer and permit the said plaintiffs to proceed with the said work and labor, and to finish and complete the same according to the terms of the said agreement; and the plaintiffs in fact say, that they were prevented from finishing and completing all the said work and labor in the manner stipulated in the agreement aforesaid, by the orders, directions, hindrance and interference of the said defendants, their agents and engineers, and that they the said plaintiffs, were ready and willing to have done and performed, and offered to do and perform all and singular the said work and labor within a reasonable time, and in the manner stipulated in the agreement aforesaid, of which said defendants then and there had notice, to wit, at the county aforesaid; but the plaintiffs were prohibited and prevented from doing the said work and labor at the times and in the manner aforesaid, by the refusal of the said defendants to observe and perform the covenants and agreements on their part to be done and performed as set forth in the written agreement aforesaid, and by the interference and hindrance of said defendants, and their agents and engineers, to wit, at the county aforesaid. By reason of which said unjust and fraudulent conduct on the part of the said defendants the said plaintiffs were prevented from realizing the benefits, profits and advantages which they would have derived from the completion of the said work and labor, and the observance of the said last mentioned agreement on the part of the said defendants; wherefore the said plaintiffs say they are injured, and have suffered damages fifty thousand dollars.

6TH COUNT. And the said plaintiffs further complain, for that whereas on the 2nd of November 1836, at the special instance and request of the defendants they undertook and agreed with the defendants, to finish and complete the work and labor upon section number nine on the rail road of the defendants, which

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runs from *Wilmington* to the *Susquehanna* river, upon the following terms and conditions, that is to say: (here insert the agreement of the 12th July 1836, leaving out the words, namely: "one mile from station number one, and the residue by November the first ensuing," and inserting in place thereof, "and within a reasonable time,") and that the said defendants in consideration thereof, promised to pay for such work and labor the prices stipulated as aforesaid, and that in pursuance of said agreement, did forthwith proceed with the said work and labor up to the month of January 1837, when they were prevented by the said defendants from further progressing in said work, and from finishing and completing the same according to the terms of said agreement in the first instance, because the said defendants refused to suffer their engineer to order or direct, where the surplus earth from the excavations on said section over and beyond the amount of earth required for the embankments in the same section, should be placed, as they were bound to do by the said agreement, and afterwards in the same month, fraudulently and illegally entirely stopped the said plaintiffs, and prevented them from going on with and completing the same, and afterwards gave the work to some body else, by which the said plaintiffs were prevented from finishing and completing their said agreement; and the said plaintiffs further aver, that if they had been permitted to go on with and finish the said work under said contract, as they offered to said defendants and intended to do, they would have made large profits, to wit, fifty thousand dollars. Whereas by the said conduct of the said defendants they not only lost the said profits, but were put to other losses and expenses by being left in the possession of a large force of men and materials, horses and carts, which they had got together for the purpose of completing said work.

7TH COUNT. And whereas also the said defendants afterwards, to wit, on the 1st of August 1837, at the county aforesaid, were indebted to the said plaintiffs in the further sum of fifty thousand dollars, for the work, labor, care and diligence by the said plaintiffs before that time done and performed, in

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and about the business of the said defendants, and for them, and at their special instance and request, and also for divers materials and other necessary things by the said plaintiffs before that time found, and provided and applied in and about that work and labor for the said defendants, and at their like special instance and request, and being so indebted the said defendants, in consideration thereof afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook and promised the said plaintiffs to pay them the last mentioned sum of money, nevertheless the said defendants not regarding their said promises and undertakings, but although often requested so to do, by the said plaintiffs, have not yet paid the said sum of money or any part thereof, but refuse so to do, to the damage of the said plaintiffs, in the sum of fifty thousand dollars.

8TH COUNT. And whereas also heretofore, to wit, on the — day and — year at the county aforesaid, in consideration that the said plaintiffs at the like special instance and request of the said defendants, had before that time undertaken to perform certain work, labor and services in and upon the property of the said defendants, to wit, on the rail road between — at the county aforesaid. And said plaintiffs aver, that they did perform the said work and labor upon the property aforesaid, and the said defendants undertook and then and there faithfully promised the said plaintiffs to pay them so much money as they therefor reasonably deserve to have of the said defendants, when they the said defendants should be thereunto afterwards requested; and the said plaintiffs aver, that they reasonably deserved to have of the said defendants the further sum of — like lawful money, to wit, at the county aforesaid, whereof the said defendants afterwards, to wit, on the day and year last aforesaid there had notice, nevertheless the said defendants not regarding their said promises and undertakings, but contriving and fraudulently intending craftily and subtly to deceive and defraud the plaintiffs in this behalf, have not as yet paid the said sums of money, or any part thereof to the said plaintiffs, although often requested so to do, although they the said defendants afterwards, to wit, on the — day of the — of the



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year — last aforesaid, at the county aforesaid, were requested by the said plaintiffs so to do, but the said defendants to pay them the same have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiffs in the full sum of, &c.

9TH COUNT. And the said *S. and H. Howard*, by their attorney aforesaid complain, for that whereas the *W. and S. R. R. Co.* heretofore, to wit, on the 12th of July 1836, at *Wilmington*, that is to say at *Cecil* county aforesaid, made another agreement in writing with said plaintiffs, by which said agreement amongst other things therein set out, the plaintiffs agreed to do all the grading of that part of section No. 9 of the *Wilmington and Susquehanna Rail Road* in the State of *Maryland*, which extends from station No. 191 to the end of the piers and wharf in the river *Susquehanna* opposite *Havre De Grace*, according to the directions of the engineer and the specifications in said agreement, for the sum of twenty-six cents per cubic yard for every cubic yard excavated, the said section to be completed in a workmanlike manner, viz: one mile from station No. 191 by the 15th of October 1836, and the residue by the 1st of November ensuing, which said agreement and specification, and all things therein contained is set out in *totidem verbis* in the 4th count of this declaration, as by reference thereto will fully appear. And thereupon afterwards, to wit, on the said 12th July 1836, at the county aforesaid, in consideration that the plaintiffs, at the instance and request of the defendants, then and there undertook and faithfully promised the said defendants to perform, fulfil and keep all things in said agreement on plaintiffs part to be performed, fulfilled and kept, they the said defendants at the same time and place undertook and faithfully promised the said plaintiffs to perform, fulfil and keep all things in the said agreement on the defendants part to be performed, fulfilled and kept; and said plaintiffs declare that soon after the making of said written agreement, for the purpose and with the intent of fulfilling and performing all things in said agreement on their part to be performed and fulfilled, to wit, on the 23rd of July 1836, at the county aforesaid, they did promptly and

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diligently commence grading that part of section No. 9, in said agreement mentioned, and were fully prepared with laborers, means and utensils to execute the work in the manner and within the time specified in said agreement for the completion of the same, and so continued actively and diligently to prosecute and do the work of grading said rail road and all other things, according to the said agreement, until the 17th of September 1836, when said plaintiffs were served by the sheriff of Cecil county with a writ of injunction, prohibiting said plaintiffs from working any longer upon a certain portion of said rail road in said agreement specified, which injunction issued from the high court of chancery of the State of Maryland in due form of law, and is set out *in eisdem verbis* in the 4th count of this declaration, together with the sheriff's return and the chancellor's order on the said injunction, as by reference to said 4th count will more fully appear. By force of which injunction the plaintiffs were prevented and delayed from executing the work in said agreement contained in time specified therein for its completion, and were enjoined from working upon part of the road mentioned in the said agreement for a long space of time, to wit, from the said 17th of September 1836, being the day on which said injunction was served on said plaintiffs, until the 30th of October in the same year, which was the day when said injunction was appealed and appeal bond filed; and the said plaintiffs aver, that the engineers of the company directed the plaintiffs to make the embankment on the rail road in the agreement mentioned, many feet wider than it was marked out on the plat of the road that was made by the engineer, and examined by the plaintiffs at the request of the defendants before entering into the agreement aforesaid, and said engineer also directed the plaintiffs to make the grade of the said road many feet deeper than it was laid down on said plat, whereby the said plaintiffs were prevented from completing the said first mile of said road before the 20th of Oct. 1836, which was then completed according to the directions of the engineer, of which the defendants had notice, then and there, at the county aforesaid. And the plaintiffs say, that

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notwithstanding the said injunction and the directions of the engineer aforesaid, they the said plaintiffs did afterwards proceed and continue from the time of making said agreement, until the time when the defendants declared the said contract forfeited as hereinafter stated, duly to comply with and progress in the execution of said agreement, without being guilty of any irregularity or negligence, and did perform, fulfil and keep all things on their part in said agreement to be performed and fulfilled, and did, after the said 15th day of October and the said 1st day of November, in the year 1836, proceed under the orders of the engineer aforesaid, and at the request of the said defendants, and by the authority of said agreement, and under the same, to execute the work in said agreement, according to the terms thereof. And the said plaintiffs declare, that after the said 15th day of October and the 1st day of November, to wit, on the 2nd day of November, in the year 1836, in consideration of the premises, and that the plaintiffs then and there, at the request of the defendants, undertook and faithfully promised the said defendants to perform, fulfil and keep all things in the said agreement on the part of said plaintiffs to be performed and fulfilled in a reasonable time, they the said defendants undertook and faithfully promised the plaintiffs to perform and fulfil all things in said agreement on the part of the said defendants to be performed and fulfilled and kept, according to the true intent and meaning of the said agreement, to wit, on the day and year last aforesaid, at the county aforesaid. And the plaintiffs aver, that they, confiding in the promise and undertaking of the said defendants, secondly and lastly above made, from and after the 2nd day of November, in the year 1836, did proceed and continue to execute the work and labor in said agreement mentioned, according to said agreement, and to perform, fulfil and keep all things in said agreement on their part to be performed, fulfilled and kept, until the 19th day of January, in the year 1837; yet the said plaintiffs in fact say, that the defendants, before the 19th day of January, 1837, contriving wrongfully and unjustly to injure the plaintiffs, did not, nor would perform, fulfil nor keep the



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matters and things on their part in said agreement to be performed, fulfilled and kept, according to their undertakings and promises firstly and secondly above made, but thereby craftily and subtly deceived the said plaintiffs in this, to wit, that the said defendants refused to permit the engineer to order or point out any place where the plaintiffs might place the earth from the excavations, when there was a large quantity of earth from the excavations, more than was required for the embankments, and also refused to pay said plaintiffs one cent and a half per cubic yard for each hundred feet haul of the earth from the excavation of the road to make the embankment at the river, although the haul from the excavations to the eastern termination of the embankment at the river, exceeded an average distance of eight hundred feet, and also refused to pay plaintiffs one and a half cents per cubic yard for each hundred feet haul of the earth from the excavation of the road, when all the other portions of the haul exceeded an average distance of eight hundred feet, as by the said agreement they were required to do. But the said defendants, after they had, as above stated, broken said contract, and disregarded their promises and undertakings, by refusing to comply with the terms of said contract, in the manner hereinbefore stated, and when the said plaintiffs had duly complied with the said contract, and whilst the same was in due progress of execution, and the said plaintiffs were not irregular or negligent, and before a reasonable time had been allowed for said plaintiffs to complete the said contract, the said defendants attempted to declare the said contract forfeited and null, without the consent and against the will of said plaintiffs, to wit, on the 19th day of January, in the year 1837, at the county aforesaid, whereby the said defendants did not, nor would suffer or permit the said plaintiffs to proceed any further to execute the said contract, but then and there wrongfully discharged the said plaintiffs from any further completion of their said agreement, and hindered and prevented them from finishing the work in said contract specified. Nor did the said defendants pay the said plaintiffs twenty-six cents per cubic yard for every cubic yard of earth excavated on said

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road, according to the measurement and valuation of the engineer, but to pay the same or any part thereof the said defendants, although often requested so to do, to wit, at, &c., have hitherto wholly refused, and still refuse, whereby the said plaintiffs say that they have not only been refused payment of the money due them for work done on said rail road before the said 19th day of January, 1837, but have also been deprived unjustly of all the profits, benefits and gains which otherwise might and would have accrued to them, if they had been permitted by said defendants to complete the work in said contract mentioned.

Whereupon, the said plaintiffs say they are injured and defrauded, and have sustained damages to the amount of fifty thousand dollars, to wit, at, &c., and thereupon they bring their suit, &c.

To this declaration the defendant pleaded :

1st. Non-assumpsit, and

2nd. Payment and satisfaction, on which issues of fact were joined.

3RD PLEA AS TO 4TH COUNT. "That after the making of the said supposed agreement in the said fourth count mentioned, to wit, on the 18th January 1837, the said plaintiffs had become, and were for a long space of time then next before, had been, irregular and negligent in the prosecution of the work in said agreement mentioned, and had not duly complied with the terms of the said agreement, to wit, at, &c.; and the said defendant in fact further saith, that after the making of the said agreement, and before, and on the said 18th January 1837, at, &c., the said work and labor in the said agreement mentioned, was not in due progress of execution, to wit, at, &c., of all which said premises the said plaintiffs and this defendant then and there, to wit, on, &c., at, &c., had notice; and the said defendant in fact further saith, that afterwards, and whilst the said plaintiffs so were and continued to be irregular and negligent in the execution of the said agreement, and without having duly complied with the terms of said agreement, and whilst the said work was not in due progress of

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execution, this defendant being of opinion that the said agreement had not been duly complied with by the said plaintiffs, and that the work in said agreement mentioned, was not in due progress of execution, to wit, on, &c., at, &c., in virtue of the provisions of said agreement, and in exercise of the authority thereby given and reserved, did declare the said agreement to be forfeited, as for the cause aforesaid this defendant might lawfully do, of all which premises the said plaintiffs afterwards, to wit, on, &c., at, &c., had notice. By reason whereof, and by force and effect of the said agreement, the same agreement thereby became and was null. And this, &c."

The 4th plea as to the 5th count; the 5th plea as to the 6th count, and the 6th plea as to the 8th count, were similar to the 3rd plea as to the 4th count, and relied upon a forfeiture of the contract of July 1836, announced on the 18th January 1837, as a bar to, &c.

7TH PLEA TO 1ST COUNT. That after the making of the said supposed contract in the said *first* count mentioned, and before the commencement of this suit, to wit, on the 12th July 1836, a certain agreement by deed in writing, was then and there made and entered into by and between the said plaintiffs and the said defendant, and which said last mentioned agreement was of the tenor, following, to wit. (This plea then set out at length the agreement of 12th July 1836—see ante.) And said defendant in fact says, that the said part of sec. No. 9, in the State of *Maryland*, of the W. and S. R. R. which extends from station No. 191 to the end of the piers and wharf in the river S., opposite *Havre De Grace*, as mentioned in said last mentioned agreement, is a part of that part of the said rail road between *Charlestown* and *Havre De Grace*, in said first count mentioned, and which is thereby alleged to have been included in the said supposed contract in said count mentioned, and not another or different part, of which premises the said plaintiffs and this defendant, before, and at the time of the making of the said agreement, in this plea recited, had notice, to wit, at, &c.; and the said defendant in fact says, that after the making of the said agreement in this plea above



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recited, the said plaintiffs, under and in virtue of the said agreement in this plea above recited, commenced and prosecuted the work on that part of section No. 9, in the State of *Maryland*, of the W. and S. R. R., which extends from station No. 191, to the end of the piers and wharf in the river *Susquehanna*, opposite *Havre De Grace*, as mentioned in the same agreement; and that all the work which was done by said plaintiffs on that part of said section No. 9, was commenced, prosecuted and done, under and in virtue of said agreement in this plea above recited, and not otherwise, nor under any other or different agreement. By reason of which said premises, the said supposed contract in the said first count mentioned, became merged, extinguished, waived, released and abandoned. And this, &c.

The 8th plea to 2nd count and 9th plea to 3rd count, were similar to 7th plea to 1st count.

The plaintiffs demurred to the 3d, 4th, 5th, 6th, 7th, 8th and 9th pleas, in which the defendants joined, and the county court (CHAMBERS, C. J. and HOPPER and ECCLESTON, A. J.,) gave judgment on the demurrers for the defendant, from which the plaintiffs prosecute this appeal.

The cause was argued before STEPHEN, ARCHER and DORSEY, J.

By H. STUMP and REVERDY JOHNSON, for the appellants, and  
By O. SCOTT and NELSON, Att'y Gen'l of the U. S. for the appellees.

STEPHEN, J., delivered the opinion of this court.

This suit was instituted in the court below upon two contracts, the one bearing date in the year eighteen hundred and thirty-five, and the other in the year eighteen hundred and thirty-six. The appellee, the defendant in the court below, filed several special pleas to the plaintiffs declaration, which contained several counts; and to those pleas the appellants, who were the plaintiffs, demurred generally. The defence of the defendant was founded upon an alleged extinguishment of the contract of 1835, by the operation of the contract of 1836,

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which, it is admitted by the parties, covered a part of the work to be done under the contract of 1835, and for which a different price was to be paid. The suit being upon the contract of 1835, for the recovery of damages, for not being permitted to execute it by the wrongful acts and doings of the defendants, if the defence of the defendants is well founded, that it was extinguished, either wholly or partially, the action on the contract itself, which was an entire one for the graduating the road from *Charlestown* to *Havre de Grace*, for twenty-four cents per cubic yard, cannot be sustained. To repel the inference of an extinguishment, either general or partial, of the contract of 1835, the plaintiffs aver in their declaration, that the contract of 1836 was entered into by them with an express understanding on their part, and that they so declared to the defendants at the time, that the contract of 1835 was not waived or abandoned by that of 1836, except so far as the road covered by the first contract was embraced by the second; and the plaintiffs contend that the silence of the defendants, when so informed, was evidence to go to the jury from which their assent might be inferred. But, according to the established principles of pleading, the fact of assent ought to have been averred, and not the evidence of it, (if the evidence stated was admissible to control or vary the written contract,) which is always matter for the consideration of the jury, and not for the decision of the court. See *Gould's pleadings*, 152, where it is said "all facts essential to the right of action or the defence must in general be expressly and substantively alleged. Hence stating the mere *evidence* of a material fact is not sufficient; the fact itself must be stated, otherwise the allegation will present no subject to which the law can be applied. Besides such a mode of pleading would, if admissible, refer the matter of fact in question to the court, instead of the jury." He there puts the case of an action of *trover*, where the plaintiff alleges a property in the goods, the loss, the finding, and a demand and refusal, but omits to aver a conversion, and says the declaration would be ill. This being a suit upon the contract to recover damages, and the contract being en-

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ture and indivisible, the suit cannot be sustained, if any part of it has been annulled by the act and agreement of the plaintiffs themselves; and looking to the pleading in the case, as spread upon the record, we are bound to assume that a part of it was annihilated by the consent of the plaintiffs themselves. In *Chitty on Contracts* it is said to be “a general rule that an entire contract cannot be apportioned; and if a party undertake to complete a certain act, before his claim to remuneration is to accrue, he cannot recover for a partial performance, although the completion was prevented by accident, as fire, &c. To the same effect this court have decided, in 6 *Harr. & John.* 44, where they say, “The agreement formed an entire contract, and to enable the plaintiff to recover on it he must prove a performance, or tender to perform every thing required by it on his part to be performed.” The contract being vacated and rendered legally inoperative in part by the consent of the plaintiffs themselves, the conclusion is inevitable that no action can be sustained upon it for the recovery of damages, on the ground that the plaintiffs were prevented by the wrongful act of the defendants from fulfilling it. Where the original contract is rescinded by the parties, after it has been performed in part, either by a waiver of the performance of the balance of the contract, or entering into a new one so inconsistent with the first as to be wholly irreconcilable, in such case a recovery may be had for the part performance on a general count, but not by declaring on the contract itself. To this effect is the case in 6th *Harris & Johnson’s Reps.*, 38. If the entirety of the contract is disaffirmed by receiving a partial benefit, the plaintiff may recover for the work done on a general count, but not on the special agreement, (*Chitty on Contracts*, 273.) The same principle is to be found recognised (if authorities be necessary for so plain a proposition) in 12th *John. Reps.* 165. In that case the plaintiff “agreed to work for the defendant ten and a half months, and spin yarn, at three cents per run; and afterwards left the service of the defendant, and brought an action against him for spinning 845 runs of yarn, at three cents per run; it was held that the contract



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of the plaintiff was entire and must be performed as a condition precedent before he could bring an action against the defendants for the price of his labour." The suit upon the second contract of the 12th of July, 1836, we think ought, upon the pleadings in the case, to have been sustained. It is a rule in pleading that "each party tacitly admits all such traversable allegations on the opposite side, as he does not traverse. For, as each party is allowed to deny, in some form, (either by a general or precise traverse,) all material facts alleged against him, the omission by either party to traverse any such fact, alleged by his adversary, is justly considered as an admission of it." *Gould's Pleading*, 152.

It appears by the *fourth* count of the plaintiffs declaration that the defendants were in default in not paying them a large sum of money according to contract, which was due according to the estimate of the engineer for work done in the month of December 1836, which was due and payable before the contract was declared to be forfeited; and also that they refused to permit the engineer to designate or point out a place where the surplus earth arising from the excavations was to be deposited; and also refused to pay the plaintiffs one other sum of money for extra hauling beyond a certain distance, as specified in their said agreement, and artfully and fraudulently contriving to impose upon said plaintiffs by forcing them to submit to an alteration of the terms of said agreement or to be deprived of all the benefits and advantages to which they were entitled under the same, declared the said agreement to be forfeited, and refused to comply with the terms and conditions thereof, whereby the said plaintiffs were thrown out of employment, and fraudulently prevented from completing, &c., and have lost all the gains and profits, &c.

In the plea filed by the defendants to this count of the plaintiffs declaration, these breaches of the contract on their part are not denied, and of course, according to the established principles of pleading, they are to be taken and considered as admitted. Such being the state of the pleadings, and the admissions of fact flowing from them, it follows as a necessary

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consequence that such annulling of the contract was a breach thereof, for which the plaintiffs had a right to recover the damages flowing therefrom, and also for the damages resulting from the previously enumerated breaches of the agreement. It was not necessary to aver damages in the plaintiffs fourth count. In 1st *Saunders on Pleading and Evidence*, 165, it is said: "If the contract be broken the plaintiff will be entitled to some damages, however small, whether they be stated or not, for damages will be implied from the very breach itself; and wherever the damages sustained necessarily and naturally arise from the breach complained of, and may therefore be implied, they need not be stated; otherwise they must, in order to prevent the surprise on the defendant, which might otherwise ensue at the trial; and if he do not state them particularly he will not be permitted to prove them in evidence." In the same book, at page 513, it is said: "Where damages are the principal object of the action the declaration should *conclude* 'to the damage of the plaintiff' of a sum sufficient to cover the real damages sustained." So, also, same book and same page, speaking on the same subject, it is said: "An omission in stating damages, when necessary, would be bad on demurrer, and perhaps after judgment." So, also, in *2d Johns. Reps.*, 149, it is said: "The damages sustained are matter of evidence, and need not be alleged, nor are they rarely ever stated, but in a general manner."

In this case the plaintiffs declaration concludes in the usual manner, and charges that they "have sustained damages to the amount of fifty thousand dollars, to wit, at the county aforesaid, and therefore they bring their suit, and so forth." This general conclusion is sufficient as to all the counts in the declaration, and obviates the necessity of charging damages generally in each one of them. The judgment of the court below is reversed, and a *procedendo* ordered.

JUDGMENT REVERSED, &c.

Tomlinson's lessee *vs.* Devore.—1843.JOHN TOMLINSON'S LESSEE *vs.* JACOB DEVORE.—*Dec.* 1843.

The courts of common law in *Maryland* have jurisdiction in cases involving the rights of lunatics, unless they have been ousted by the act of 1785, ch. 72, and its supplements, which they do not do.

The act of 1785, ch. 72, contains no express ouster of the jurisdiction of the courts of common law, and hence they have concurrent jurisdiction over the rights of lunatics with the Court of Chancery.

To divest courts of general jurisdiction of their jurisdiction, terms to that end must be employed in the statutes intended to accomplish such a purpose, and it cannot be effected, unless by express terms, or by necessary implication.

Upon a judgment, execution and sale, the title to land passes, though the defendant in the judgment was a lunatic at the time of its rendition.

Courts of justice guard and maintain with jealous vigilance the titles of purchasers acquired under judicial sales.

APPEAL from *Allegany* County Court.

This was an action of *Ejectment*, brought on the 5th Oct. 1836, for a tract of land called "*Sampson's Riddle Amended.*" The defendant took defence on his title, and pleaded not guilty.

At the trial of the cause, the parties agreed, "that no objection shall be made to the suit by the defendant's counsel, on the ground that the said *Tomlinson* appeared by attorney, instead of his trustee, but that the said suit shall stand as though said *Tomlinson* appeared by his trustee. The plaintiff, on his part agrees, that if it be a valid objection to said suit, because the same was not brought in the name of the trustee instead of the name of the lunatic, then he will suffer a *non pros.*"

The cause was then submitted to the court on the following statement of facts:

The parties, plaintiff and defendant, in this case, agreed to the following facts in the nature of a case stated for the opinion of the court. It is admitted that the land, for the recovery of which this suit is brought, was conveyed by *John Tomlinson, Sen.*, the father of the plaintiff, to the plaintiff, by his deed duly executed, acknowledged, and recorded on the 3rd day of August, 1818. That on the 21st of July, 1821, four judgments were recovered by certain creditors of the said *John Tomlinson*, the plaintiff, against him, before a justice of the peace for said



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county; that on the 12th January 1822, two other judgments were recovered by creditors of the said *John Tomlinson*, the plaintiff, against him, before a justice of the peace of said county, and that these judgments being unpaid, were revived by *scire facias* on the same in August 1827; that at the *April* term of *Alleghany* county court 1827, a judgment was rendered by said court against the said *John Tomlinson*, for a debt of his, in favor of the creditor and plaintiff in that case; that in October 1827, *fi. fas.* were issued on all said judgments, and placed in the hands of the sheriff of *Alleghany* county, who, in virtue thereof, levied them on the land, for the recovery of which this suit is brought, and sold the same at public sale, to the highest bidder, and that *Jacob Devore*, the defendant in this case, became the purchaser thereof, paid the consideration since he bid for the same, to the said sheriff, who, by his deed of bargain and sale, duly executed and acknowledged on the 17th day of February, 1828, conveyed said land to said *Devore*, who took possession of said land; he has ever since, up to this time, continued to hold possession of the same; that on the 12th day of July, 1822, application was made to the *Chancellor of Maryland*, by *John Tomlinson, Sen'r*, the father of the plaintiff, for a writ of lunacy to be issued, to enquire of the lunacy of said *John Tomlinson, Jun.*; that a writ was accordingly issued, and an inquisition regularly taken and found, and that by that inquisition the said *John Tomlinson* was found to be a lunatic on the 25th day of July, 1822, when the inquisition was taken, and to have been so *for five months* and upwards before that time, which inquisition was returned to the Chancery Court, and upon a petition filed by *John Tomlinson, Sen'r*, the father, he was appointed the trustee for the care and custody of the person and estate of the said *John Tomlinson, Jun.*, who was so found to be a lunatic.

If, upon the foregoing statement of facts, the court are of opinion that the judgments at law, *fieri facias*, sale by the sheriff, and conveyance made by him of the land as aforesaid, to the defendant, are sufficient to transfer the title to said land to the defendant, notwithstanding the lunacy of the plaintiff,

as found by the inquisition as aforesaid, that then the verdict is to be entered for the defendant; but if the court shall be of opinion that the said judgments are inoperative and void, because of the lunacy of the said *John Tomlinson, junior*, the plaintiff, as found by said inquisition, as also the *fi. fas.* and sale as aforesaid, that then the verdict of the jury shall be for the plaintiff.

On the foregoing statement, the court were of opinion, that plaintiff is not entitled to recover, and so instructed the jury. The plaintiff excepted.

The verdict and judgment being against the plaintiff, he appealed to this court.

The cause was argued before STEPHEN, ARCHER, DORSEY and SPENCE, J.

By PRICE for the appellant, and

By McKAIG, McMAHON and F. A. SCHLEY for the appellee.

SPENCE, J., delivered the opinion of this court.

The statement of facts agreed to, and upon which the court below instructed the jury in this case, presents for the revision of this court, a question of great importance and interest.

Questions of jurisdiction in relation to courts must always be important, because they are questions which ascertain the limits of judicial power; and in this case, it is one of peculiar interest, arising from the character of the infirmity of the individual, which, it is insisted, exempts him from the jurisdiction of the courts of law.

The argument of the appellant's counsel conceded that the courts of common law had jurisdiction in *Maryland* in cases involving the rights of lunatics, unless they had been ousted of their jurisdiction by the act of 1785, ch. 72, and the supplements thereto; and had this concession been withholden, the authorities, both in this country and *England*, are conclusive.

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The question then is, does the act of 1785, ch. 72, or any supplement thereto, oust the courts of law of jurisdiction in this case? After a careful examination of the act of 1785, ch. 72, we may venture to affirm that there is no language employed, or combination of words used, which can be construed to divest the common law courts of jurisdiction in cases involving the rights of lunatics, or raising even a strong implication of the fact.

The act of 1785, chap. 72, contains no expression of the same signification or import, as that used in the *Statute of New York*; 1 *N. K. Laws*, 147; in relation to which latter statute, *Chancellor Kent* says: "the fit and proper remedy for the creditor of a lunatic, is in this court, and not by an action at law. The commitment, by statute, of the care of the lunatic and his estate, to this court, and the power given to it to sell the real estate, shows that this is the proper tribunal for the creditor to resort to." Had the Chancellor's opinion stopped here, the fair conclusion would be, that the Chancellor had concurrent jurisdiction, under this statute, with the common law courts.

*Chancellor Kent*, in the same case, *Brasher vs. Cortland*, 2 *John. Ch. Ca.* 403, in commenting on the 6th sec. of the same statute, uses the following language: "But this last provision is important in another view, it goes absolutely to interdict the remedy at law, by prohibiting a sale of the real estate under execution." The negative expression in the *Statute of New York*, the Chancellor construes to confer exclusive jurisdiction, and without this provision, the irresistible inference is, that his jurisdiction would be concurrent with the courts of common law. The Act of Assembly of *Maryland* provides, "that the Chancellor shall have full power and authority, in all cases, to superintend, direct and govern the affairs and concerns of persons who are or may be lunatic or idiots, both as to the care of their persons and estate, and may appoint a committee, &c., and that if it will be for the benefit and advantage of the estate of such persons (idiots or lunatics,) to sell a part of the real estate to pay their debts, &c." Thus the 6th sec. of the act



of 1785, is very similar to the *Stat. of New York*, and may, with great fairness, be construed in cases involving the rights and interest of lunatics to confer jurisdiction upon the Court of Chancery in *Maryland*; but as there is no express ouster of the jurisdiction of the courts of common law, we are driven to the conclusion, that they have concurrent jurisdiction with the Court of Chancery.

The doctrine is clearly settled by a long train of concurrent decisions, that to divest courts of general jurisdiction of their jurisdiction, express terms to that end must be employed in the statute, and that it cannot be effected, unless by express terms, or by necessary implication. Vide *Rex vs. Chaseley*, 2 *Bur.* 1040; *Heath & Room*, 2 *Hill's R.* 42—*ex parte*.

The view which we have taken of the question raised upon the first point, reaches, controls and determines all the other questions in this cause. The judgments being good at law, and no objection made to the executions, or sale made under them, in point of form or substance, it follows as a necessary consequence, that the title passed by the sale to the purchaser, and that the court properly instructed the jury to find for the defendant.

We forbear to present either arguments or authorities to prove the jealous vigilance with which courts of justice guard and maintain the titles of purchasers, acquired under judicial sales, as there is no portion of the law, in regard to which the adjudications have gone farther, or are more uniform and conclusive.

JUDGMENT AFFIRMED.

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Stiles et al, vs. Brown et al.—1843.

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JOHN S. STILES et. al. vs. SARAH BROWN et. al.—*Dec.* 1843.

Where the court perceives from the mutual allegations of the parties, and from the evidence adduced in the cause, that they had stated and settled an account between themselves, they cannot claim a decree to account.

A complainant seeking to investigate ancient accounts, will have his case subjected to severe scrutiny; although he is not to be visited with all the consequences of *laches*; while on the other hand, the defendant's evidence may receive a more indulgent consideration. The time at which the claim is advanced, and a failure to prosecute it against original parties, while they were alive, are circumstances calculated to create suspicion against such a claim, and in a doubtful case strengthen the defences which the representatives of such original parties may set up.

Where the parties settle and adjust their mutual claims, and one gives the other a note for the balance due, this forecloses an enquiry into all antecedent transactions, unless upon the ground of error or fraud.

#### APPEAL from the Court of Chancery.

The bill of *John S. Stiles*, of the city of *Baltimore*, and of *William P. Maulsby*, trustee, filed on the 2nd July, 1840, for the benefit of the creditors of said *Stiles*, stated: that sometime about the year 1827, a judgment having been rendered against *J. S. S.* in *Baltimore* county court, for the sum of \$1,000, or thereabouts, he requested a certain *Stewart Brown* to become his surety on an appeal bond, for the purpose of carrying said cause to the Court of Appeals; and at the same time he borrowed from said *Brown* his promissory note for the sum of about \$1,900, and for the purpose of indemnifying the said *B.* for his said suretyship, and of securing the payment of the said note so borrowed, he conveyed to the said *B.* several lots or parcels of land lying and being in the *City of Baltimore*, and six shares of stock in the *Temascaltepec Mining Company of Baltimore*; that several, if not all, of the said shares of stock were sold by the said *Brown*, in his life-time, but for what prices or sums your orators do not know, except two shares, which sold for the sum of \$1,265, as stated by said *B.*; and that said lots or parcels of ground were also sold, partly in the life-time of the said *B.* and partly since his death; that the complainants have no accurate knowledge of the amount of money realised by said sales, but are fully convinced that it largely exceeds the

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amount of the said judgment and note; and, that a considerable sum is now due and owing to your orators, who further state that, sometime in the year 1835, *John S. Stiles* made application for the benefit of the insolvent laws of *Maryland*, and that *William P. Maulsby* has been duly appointed permanent trustee for the benefit of the creditors, and has given bond, with security, according to law; that the said *S. B.* departed this life sometime in the year 1832, intestate, and that letters of administration have been granted to *Sarah, George, and John N. Brown*; that said administrators, though often requested, have wholly refused and neglected to render to your orators any account of the monies received by the said *S. B.*, for the said stocks and for said lots or parcels of ground, and to pay over the balance now remaining in their hands after payment of the said judgment and the promissory note, &c.

Prayer that subpœna may issue to said administrators, &c., and that complainants may render a full, true and perfect account of all and singular the monies received by the said *B.*, in his life-time, or by the said administrators, or any or either of them, since his death, from the sale of said stock and property before mentioned, and that a decree may pass ordering and requiring said administrators to pay over to your orator, *William P. Maulsby*, trustee, as aforesaid, such balance as upon a fair settlement of accounts may be found due, and that such other and further relief may be granted in the premises as to justice and equity shall seem meet, &c.

The answers of *Sarah, George, and John N. Brown*, administrators of *Stewart Brown*, admitted that said *Stiles* made application for the benefit of the insolvent laws of *Maryland*, as stated in complainants bill, some time in the year 1835; but they do not know, and do not admit, that said *Maulsby* has been duly appointed permanent trustee for the benefit of the creditors of said *Stiles*. They admit that said *S. B.* departed this life some time in the year 1832, intestate, and that letters of administration have been granted to these defendants. They also admit that the said *John Stiles*, by deed of mortgage, dated 24th May, 1827, conveyed to said *S. B.* five lots of ground



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situate, &c. numbered 21, 24, 44, 55, and 59, for the purpose stated by complainants in their bill; and that by another deed, dated the 31st of July, 1829, said *Stiles* further conveyed the said lots to said *S. B.*, with power to sell and dispose of the same absolutely, and the proceeds to apply, first to the payment of the said *S. B.* the amount due to him on the judgment mentioned in said mortgage, and for the payment of which the said *S. B.* had become surety, and of the sum of money lent and advanced by said *S. B.* to said *Stiles*, and secured by said mortgage, and the surplus, if any, to pay over to said *Stiles*, or his assigns. They admit that three of said lots were sold in the life-time of said *S. B.*; but they allege that if said *Stiles* has no accurate knowledge of the amount of money realised by said sales, as stated in complainants bill, it is because he has forgotten his own acts, and not because said *S. B.* failed to render an account thereof to him; for they further allege that it appears by the records of *Baltimore* county court, that on the 9th of October, 1829, the said *Stewart Brown* and *John S. Stiles*, by deed of that date, conveyed to *William D. McKim* the lots 21 and 24, above mentioned, the said *S. B.* receiving \$400 consideration therefor. That on the 10th of October, 1829, the said *S. B.* and *J. S. S.*, by deed of that date, conveyed to *John Kirby* the southernmost moiety of lot No. 44, above mentioned, *S. B.* receiving \$260 consideration thereof; and that on the 10th October, 1829, the said *S. B.* and *J. S. S.*, by deed of that date, conveyed to *William H. Stewart* the northernmost moiety of said lot number 44, *S. B.* receiving \$260 consideration therefor. These defendants allege that they have no accurate personal knowledge of the state of accounts between said *S.* and said *B.* in the life-time of said *B.*, but they believe the said *S.* to have been largely indebted to the said *B.* at the time of his death. They allege that after the death of the said *S. B.* said *S.* filed his bill in this honorable court against the widow, heirs, and administrators of said *B.*, alleging that said *S. B.* by his bond of conveyance, dated the 23rd of November 1830, bound himself to convey to said *S.* two pieces or lots of ground, that is to say, the

remaining lots of these above mentioned, to wit, the lots number 55 and 59, on said *S.* paying to said *B.* a promissory note of even date with said bond, drawn by said *S.* in favor of said *B.* or order, for \$2,700, bearing interest, payable at four months after date. That said *S.* in his said bill further alleged that more completely to secure the payment of said promissory note said *S.* and his wife executed to said *B.* a mortgage of a tract of land in *Queen Anne's county, Maryland*, called *Marsh's Chester Farm*, all of which, &c. These defendants further allege that on the application of said *S.* in said bill, and with the consent of the defendants thereto, and upon the allegation of said *S.* therein, that he was indebted to the administrators of *S. B.* the sum of \$2,700 on said note, a decree was passed adjudging and ordering that on payment by said *S.* to the trustee in the said decree named, or to the said administrators, or on bringing into this court, to be paid to them, the sum of \$2,700, with interest thereon, and the costs of the suit, the said *John S. Stiles* should have, hold, &c.; but in case said sum of money, with interest and costs, was not paid before the 1st of November 1833, then said trustee was ordered and directed to sell said property for the purpose of settling and paying the same, &c. These defendants further allege, that although said *Stiles*, in his said bill, admitted that he was indebted to the administrators of *S. B.* in the sum of \$2,700, yet that defendants have never claimed said amount from him, but that they have always limited their demand to the sum of \$1,450, which they believe to have been justly due and owing from said *S.* to said *B.* on the promissory note of said *Stiles*, for that amount, dated 11th October 1832, drawn in favor of said *S. B.*, which note they file, &c. These defendants further allege, that after the passage of said decree, to wit, on the 8th day of August 1833, the said *Stiles* and his wife, and the said *George Brown*, as trustee, by deed of that date, sold another of the above mentioned lots of ground, to wit, number 55, to *John Patterson*, for the sum of \$750, of which \$150 were received by said *Stiles* and \$600 by said *G. B.*, in part liquidation of the said sum of \$1,450; and that said deed expressly

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admits that said *Stiles* was indebted to the representatives of *S. B.* in said sum of \$1,450, as will appear by reference to a copy of said deed, which, &c. These defendants further allege that after crediting said *S.* with said sum of \$600, a considerable amount still remained due, and said *Stiles* entirely failing to pay the same at the time limited by said decree for the payment of the same, said trustee proceeded to sell the other lot of ground, to wit, lot number 59 above mentioned; that he sold the same for the gross sum of \$910; that the sale thereof was duly reported to and ratified by this honorable court.

In relation to the *Temascaltepec mining stock*, these defendants say they know nothing thereof, except from some loose memoranda contained upon a paper found among the papers left by the said *Stewart Brown*, and which paper is herewith filed, marked, &c. From this memoranda it appears that said *S.*, to secure his note for \$1,995, due the 26th May 1828, transferred six shares of said stock to said *S. B.*; that on the 12th day of September 1828, one of these shares was sold for \$620; on the 29th day of September 1828, another was sold for \$645; on the 4th October 1828, one was returned to *J. S. S.*; and on the 25th February 1829, another was given to said *S.* to be sold, he to keep \$150, the balance to be paid to *S. B.* It does not appear whether said *Stiles* ever sold said share of stock, or paid any part of the proceeds thereof to *S. B.* From memoranda on another part of said paper it further appears that on the 30th September 1828, the said *S. B.* held as security for the note of *John McFadon*, dated the 29th September 1828, at ninety days, for \$666, two shares of *Temascaltepec mining stock*, viz: one of those of said *Stiles*', and one transferred by *Margaret McFadon*; and that on the 25th March 1829, two shares of stock were transferred to *Margaret McFadon*; whether one of them shares was the property of said *Stiles*, and if his, what it produced, these defendants do not know. It does not appear what became of the remaining share or shares of stock transferred by said *Stiles* to said *Brown*; and defendants do not know whether said share or shares were returned to said *Stiles* or sold by said *Brown*, or whether they



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still remain in the name of said *Brown*; but they allege that said stock, about Nov. 1829, became perfectly worthless in the market, and has so continued ever since; and they think it probable that it was so considered both by said *Stiles* and *Brown*. They allege that there is now standing in the name of *Stewart Brown* some shares of said stock, and that they are ready to transfer a share or shares thereof to said *Stiles*, or to his permanent trustee, whenever ordered to do so by this honorable court. They allege that they never heard of any claim or demand on account of said stock by said *Stiles* until a long time, that is to say, about six years after the death of said *S. B.*; and they further allege that said *Stiles* having, long after the transfer of said stock to said *Stewart Brown*, given his said note to said *Brown* for \$1,450, as above alleged, and having after the death of said *Brown* deliberately signed a deed setting forth that he was indebted to the representatives of said *Stewart Brown* in that sum, shows satisfactorily that complainants can have no fair claim against the representatives of said *Stewart Brown*, for or on account of said stock, but that all accounts between said *Stiles* and *Brown* must have been settled between them in the life time of said *Brown*, and the above amount of \$1,450 have then been ascertained to be due, &c.

With this answer the various exhibits referred to in it were filed, and after proof taken, the cause was referred to the auditor, who, with other accounts, reported account B, viz :

DR. *John S. Stiles in acc't with Sarah Brown, George Brown and John N. Brown, admin'rs of S. Brown.*

1832, Dec. 13th, To his note due this day, - \$1,450 00

By this sum paid by sale of property, 8th Aug. 1833, interest having been paid, - - - 600 00

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 850 00

Interest from 8th Aug. 1833, to 15th July 1835: 1 y. 11 m. 7 ds. 98 74

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 948 74

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By proceeds of sale in <i>Stiles vs.</i> <i>Brown</i> and others, in this court, 15th July 1835, and defendants answer, . . . . .	\$834 53
	<hr/>
	114 21
Interest from 15th July 1835 to 28th Oct. 1841: 6 ys. 3 ms. 13 ds. . . . .	43 08
	<hr/>
Balance due to the defendants	\$157 29

Which was ratified by the Chancellor, (BLAND,) 3rd March 1842, who also decreed that the said balance should be paid the defendants, out of the insolvent's estate, by the trustee, if the assets were sufficient to pay the same.

The complainants appealed to this court.

The cause was argued before STEPHEN, ARCHER, DORSEY and SPENCE, J.

By ALEXANDER for the appellants, and

By BROWN and BRUNE for the appellee.

ARCHER, J., delivered the opinion of this court.

It has been admitted by the counsel for the appellant, that if we should believe from the mutual allegations of the parties, and from the evidence adduced, that they had stated and settled an account between them, the appellants cannot claim a decree at our hands. This admission is in strict conformity with the rules of equity governing bills to account.

In our enquiry into this question, we cannot forbear to remark that the account now sought at the hands of the defendant, is of transactions not of recent origin, but of an antiquity, which if it do not in point of law subject the party to be visited with all the consequences of laches, yet necessarily subjects his case to a severer scrutiny, and the defendants evidence to a more indulgent consideration. The time, too, at which this claim is sought to be enforced—several years after

the death of the party with whom the transactions were had, who if living, it is reasonable to believe, might have explained what at this distance of time has thrown difficulties over the transactions complained of; and the failure during the lifetime of the defendant's intestate to institute this proceeding, are circumstances calculated to throw suspicion over the claim of the complainant, and in a doubtful case would strengthen the defences which might be set up in behalf of the defendant.

The testimony, however, in the record leaves us no room for reasonable doubt on the subject. On the 11th of October, 1832, *John S. Stiles* passed his note to *Stewart Brown*, payable four months after date, for fourteen hundred and fifty dollars. A bill was filed by *Stiles*, (at what time the record does not show,) alleging that he had given a mortgage to secure *Brown* the payment of the sum of \$2,700, and praying a decree for the re-conveyance of the property mortgaged upon payment of the debt; and the Chancellor decreed, on 13th July, 1833, the payment of the money and re-conveyance of the property, and in case of a failure to pay the money that the mortgaged property should be sold. Afterwards, on the 8th of August, 1833, *George Brown*, the trustee in said chancery suit, *John S. Stiles* and wife, unite in a deed of a lot of land in the city of *Baltimore* to *John Patterson*, in which deed the decree above referred to is recited, and it is further recited that at the time of passing the decree, viz, on the 13th July, 1833, the sum of \$1,450 only was owing to *Stewart Brown's* representatives from *John S. Stiles*, which it is recited is known to and admitted by *Brown's* administrators. Here is a clear and solemn recognition of a settlement of accounts, and an adjustment of claims. Only the sum of \$1,450 was due to *Brown*. The parties correct the error in the decree by their mutual admissions, and assume the amount of the note of October 11th, 1832, as ascertaining the balance due. But independent of this clear recognition of a settlement and adjustment of the claims of the respective parties, the letter of *Stiles*, of the 23rd February, 1837, in which he promises to call and adjust the balance, is strongly confirmatory of the idea of a settlement



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Bowling and wife vs. Lamar, adm'r.—1843.

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between the parties, and entirely negatives the hypothesis that the representatives of *Brown* are either largely indebted to him, or indebted to him at all. By the testimony which the record furnishes we feel ourselves led conclusively to the opinion that the parties settled and adjusted their claims by the note of 13th October, 1832. This of course forecloses an enquiry into all antecedent transactions, unless upon the ground of error or fraud, and we perceive no evidence of either in the record. If it be true that some of the shares of the *Temascaltepec mining company* remained in the hands of *Brown* unsold, which had been transferred to him as a security for a loan, we may fairly infer, the proof showing they were worthless in December, 1829, that they were left, on the settlement of October, 1832, when the note was given for \$1,450, in the hands of *Brown*, with consent of *Stiles*. They were then worthless and would be of no use to any one.

Upon the whole case, therefore, after bestowing our best reflections upon it, we entertertain the opinion that account B, as reported by the auditor, reaches the justice of the case, and as this account has been made the basis of the Chancellor's judgment we affirm his decree.

DECREE AFFIRMED.

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RICHARD Q. BOWLING AND WIFE vs. MAREIN T. LAMAR,  
ADM'R C. T. A. OF JAMES LAMAR.—*December* 1843.

Where a legatee interposes the plea of limitations to the final passage of an administrator's account of the payment of the assets of the estate to creditors, no decree or order which the orphans court might pass in the premises, would divest the courts of law of jurisdiction over the same subject matter; and the fact of the administrator being a creditor, claimant, does not change the nature of the case.

The plea of limitations (technically considered as such,) is not applicable to proceedings before the orphans court, in relation to the claims of creditors. That court may look to the fact of such a bar as evidence to be weighed with all other testimony, in relation to any claim, in determining its justice, and the propriety of passing or rejecting it.

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The right to interpose the plea of limitations to claims against a deceased's estate, *before the orphans court*, is vested in executors and administrators by our testamentary system.

The fact that the orphans court has endorsed the claim of an administrator against his intestate's estate, to be allowed when paid, will not prevent the residuary legatee from objecting, before the same court, to the justice of the demand, and requiring full proof of its existence prior to the ratification of the administration accounts, in which he seeks an allowance of his demand as paid.

For want of full proof when demanded, the orphans court may reject any claim against a deceased's estate, after it has been passed and before payment.

After a decree to account, on a bill filed by a residuary legatee against an executor, upon a creditor filing a claim, it is competent for the residuary legatee to plead the act of limitations.

But as to proceedings *at law* by a legatee, distributee or creditor, whether competent for them to defeat the claims of creditors of the deceased, by the plea of limitations, this court intimates no opinion.

The case of *Lee vs. Lee and Welsh*, 6 G. & J. 316, is not in conflict with *Stevenson et al. vs. Shriver and wife*, 9 G. & J. 324. In the latter case, this court considered the *prima facie* effect of the order of the orphans court, when passed, as evidence coming in collaterally, while in the former cause, the question was whether the orphans court, acting *de novo*, ought to pass such an order at all.

This court will not pronounce upon the rights of a residuary legatee for life, with a bequest over to others, where the record does not contain the will under which the legatee claims.

The orphans court passed certain claims against a deceased's estate; when the administrator came to settle his administration account, the claims were objected to, and full proof of them demanded, but the court allowed them. Upon appeal, this court reversing the decision of the orphans court, remanded the cause without prejudice, with liberty to take further proof.

### APPEAL from the Orphans Court of Prince George's County.

On the 10th December 1842, the appellee offered for passage his *first* account as administrator aforesaid, in which he charged himself with \$7,347.75, and claimed an allowance of accounts No. 1 to 41 inclusive, \$4,605.36, leaving a balance due the estate of \$2,742.28.

The appellants on the 25th April 1843, filed their petition, representing that *James Lamar* died about the 14th May 1838, having made his last will and testament, in which he bequeathed to the petitioner, *Elizabeth*, the wife of the said *Richard*, and sister of the said *James*, all his personal property, during

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the term of her single life, (the said *Elizabeth* being then a widow,) and after her death or marriage the said personal estate was given or bequeathed to *Mary E. Childs*, the daughter of said *Elizabeth*, by a former husband, and the niece of the said *James*, as may be more fully seen by reference to said last will and testament, duly admitted to probat and now of record in this court, and which your petitioners pray may be taken as a part of this petition; that some time in the month of October 1841, the appellants were intermarried, by which event the said personal estate became the right and property of the said *Mary E. Childs*, according to the provisions of the said will, and your petitioners were duly appointed guardians to the said *Mary*, and as such have given bond and are duly qualified; that a certain *Marcin T. Lamar* has taken out letters of administration, with the will annexed, on the personal estate of the said *James Lamar*, and possessed himself of the entire personal estate of the said *James*, *but as yet has passed no account whatever with this court*; that they are advised the said *M. T. L.* has filed in this court and presented for passage an administration account, in which he claims credits and allowances for a large sum *as due to him*, the said administrator, from the said testator, *James*, amounting to the sum of \$1,547.-09, or thereabouts, and claims to be allowed by your honorable court, to retain in his own hands enough of the assets of the said testator to pay the same. The petitioners object, as the guardian of the said *M. E. C.*, to whom the residue of the said personal estate belongs, after the payment of all just debts, to the payment or allowance of said account, claimed as due to him by the said *James Lamar*, because they charge that the same is unjust, and that the said *J. L.* is not so indebted, and having no other remedy in a case like the present, except by resort to this court, submit that the same ought to be rejected; that the claim is barred by the statute of limitations, is a stale demand, &c., and they call for full proof thereof. Various other claims in said administration account were also objected to on the same grounds, and full proof demanded. Prayer—that the said claims be rejected.



The appellee answered the said petition, denied its allegations in a general way, insisted that he had paid the accounts objected to, and offered to produce full proof as may be required, and also denied the right of the petitioners to plead limitations.

After this the appellee produced proof to the *Orphans' Court*, which need not be more particularly stated, than it is in the opinion of this court; and on the 25th April, 1843, the objections set forth in the petition were overruled and the account of the appellee was allowed and passed, when this appeal was prosecuted.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS and SPENCE, J.

By T. F. BOWIE for the appellants, and  
By ALEXANDER and PRATT for the appellees.

DORSEY, J., delivered the opinion of this court.

All objections to vouchers Nos. 1, 8, 9, 13, 18, and 32, for which credits were allowed *Marein T. Lamar*, administrator *cum testamento annexo* of *James Lamar*, in his account settled with the orphans court of *Prince George's* county, on the twenty-fifth of April, in the year 1843, being waived and withdrawn, this court are only called upon therefore to decide whether the objections taken to vouchers Nos. 4, 10, 39, and 40, were properly overruled by the orphans court. Of all these vouchers or claims the appellee was called upon by the appellants to offer full proof, and to the voucher No. 4 the plea of limitations is interposed as a bar.

In this attitude of the case the first question presented for our determination is, have the appellants the right of preferring such a plea, before the orphans court, in bar of the appellees claim?

To support the affirmative of this proposition we have been referred to the case of *Shrewen vs. Vanderhorst*, 1 *Russ. & Mylne*, 347, where after a decree to account, on a bill filed by a residuary legatee against an executor, upon a creditor's filing

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a claim, the *Lord Chancellor* decided that it was competent for the complainant (the residuary legatee) to plead the statute of limitations. In delivering his opinion he states that "the question here is, whether, when a decree has been pronounced, taking possession of the estate, and vesting it in the court for the purpose of distribution, a decree by which the accounts are directed to be taken, and the assets are to be administered in the masters office, and after which the common law must be altogether silent," the plea must not be considered fatal? And in the same case, in *2 Russ. & Mylne*, 75, the Master of the Rolls, who allowed the residuary legatee to plead the statute of limitations to the creditors claim, "stated the ground of his decision to be, that after a decree the executor was not at liberty to do any act which affected the relative rights of creditors." The same reasons do not exist for receiving such a plea, from such a source, in proceedings before the orphans court. No decree or order which the orphans court might pass, in the premises, would divest the courts of law of jurisdiction over the same subject matter, nor would it thence follow that the common law must thereafter "be altogether silent;" or, in the language of the Master of the Rolls, would the executor be deprived of the "liberty to do any act, which affected the relative rights of creditors." The grounds upon which the case of *Shrewen vs. Vanderhorst* was decided, being wholly inapplicable to proceedings before the orphans court, can have no influence upon the opinion of this court in the case now before it. Does the fact of the executor being the creditor, claimant, change the nature of the case? We think it does not. If the appellants can, in their suit at law now pending, in any way, defeat the appellees claim by a plea of limitations, no decision which the orphans court could have made in the case before it could destroy or impair their power of doing so. We do not therefore regard the plea of limitations (technically considered as such) applicable to proceedings before the orphans court, in relation to the claims of creditors. That tribunal may, it is true, look to the fact of such a bar as evidence to be weighed with all other testimony in relation to any claim, in deter-

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mining on its justice and the propriety of passing or rejecting it; but as a technical statutory bar, no legatee or creditor has in the orphans court authority to interpose it against a creditor's claim, that power, by our testamentary system, being vested in executors and administrators. In what we have said we desire it to be understood that we have intimated no opinion that, in any proceeding at law by a legatee, distributee, or creditor, it is competent for them to defeat the claims of creditors of the deceased by the plea of limitations.

Voucher or claim No. 4, it would appear from the endorsement upon it, had been passed by the orphans court anterior to the objection filed by the appellants to its allowance in the administration account then about to be settled by the appellee before that court. The appeal in this case being taken to the decree and order overruling the objections in the appellants petition, and allowing and passing the administration account of the appellee, and not to the order of passage, endorsed on voucher No. 4, it is insisted by the appellee that, independently of the proof offered for its establishment and inserted in the record, the order of passage endorsed upon it is *prima facie* evidence of its correctness, and in the absence of all proof to the contrary, fully warranted the decree and order of the orphans court as far as that voucher is concerned. The position thus insisted on is directly in conflict with the decision of this court in the case of *Lee vs. Lee and Welsh*, 6 G. & J. 316, where the orphans court were called on by the petition of the person interested as residuary legatee to re-examine and adjudicate anew upon a claim, of one of two executors, against the deceased, which had been passed by the court, but remained unpaid. Upon such a review this court say that the passage of the claim "adds nothing to its intrinsic merits or authenticity, when reviewed, as it was by the orphans court, upon the proceedings before it." That "the claim having been contested before payment, its passage by the orphans court is no evidence of its correctness. It must be supported by testimony substantially sufficient for its establishment before a jury." The case now before us has been brought up on proceedings in no



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wise distinguishable from those in the case of *Lee vs. Lee and Welsh*, and can by no ingenuity be withdrawn from the operation of the principles there established.

But it has been asserted by one of the counsel for the appellee that the case of *Lee vs. Lee and Welsh* is in obvious conflict with the case of *Stevenson and al. vs. Shriver and wife, 9 Gill & John. 324*, and is overruled by it. After a careful perusal of both the cases we can discover nothing by which this assertion can be sustained. That part of the court's opinion, in the latter case, in which it is alleged this inconsistency appears, is where the court, in discussing the question, whether, where the estate is insufficient for the payment of debts, a creditor has a right to appeal from an order of the orphans court passing a claim of an executor or administrator, says: "Conceding, as is alleged, that the passage of the claim of an executor or administrator, is not conclusive upon a distributee or creditor suing such executor or administrator, and leaves him at liberty to shew the illegality of the allowance thus made; yet it so increases the difficulty of so doing that such an order cannot be said not to impair the rights of a distributee or of a creditor, where the assets of the deceased are inadequate to the payment of debts. The allowance of the claim is *prima facie* evidence of its correctness, and the executor or administrator need offer no further evidence to sustain it. The *onus probandi* is shifted from the executor or administrator to the creditor." These remarks of the court, in the latter case, are perfectly consistent with its decision in the former, referring to a proceeding in a different tribunal, where the question would be, not whether the orphans court acted correctly in passing the claim, but whether the claim, according to the proofs in the cause, ought to be sustained or enforced in a court of justice? The order of the orphans court would be offered but as *prima facie* evidence; as such it is the decision of a court of competent jurisdiction, and must be respected accordingly. It forms no part of the issue in the cause, but coming collaterally in question to the extent to which it is an adjudication, it must be recognised. In the case of *Lee vs. Lee*

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and *Welsh*, the very question in issue was, whether the orphans court ought to pass the claim. It was taken up by the orphans court *de novo*, and consequently its judgment should have been formed upon the evidence adduced by the parties litigant, and not upon any opinion it may have theretofore formed or expressed upon the *ex parte* testimony formerly before it. And in accordance with these views, and not in conflict with the case of *Lee vs. Lee and Welsh*, was the case of *Stockett's executor vs. Jones and wife*, decided in 10 *Gill & Johnson*, 276.

Does the record present evidence sufficient, in point of fact, to establish the charges in voucher No. 4, and warrant the orphans court in overruling the objection made to their allowance, is our next inquiry? To the admissibility of the testimony offered for this purpose no exception has been taken. That being the case, we think it does satisfactorily establish the first, second, third, fourth, seventh and eighth items of charge in voucher No. 4. But in support of the fifth and sixth charges in that voucher, as appears by the record, no proof having been offered, the orphans court erred in allowing them.

The orphans court also erred in allowing voucher No. 10, the appellee having wholly failed to offer the requisite proof to sustain it. It is true he has exhibited an account, with a receipt upon it, purporting to have been given by or on account of the sheriff of *Prince George's* county, for the apprehension fee and jail fees of negro *Hanson*, a slave of *Gustavus Lamar*, with a portion of whose estate, as the administrator thereof, *James Lamar* has been charged by the appellants. But no proof has been offered of the execution of the receipt, or that negro *Hanson* had ever runaway or been confined in jail as a runaway.

The orphans court were in error, also, in allowing voucher No. 39, purporting to be an open account of *C. C. Hyatt*, against the "estate of *James Lamar*," commencing in June, 1838, and terminating in December 1840, with a certificate of *C. C. Hyatt* that it had been settled by *Marcin T. Lamar*. Of this claim there is not to be found in the record one particle of evidence to show that a single article in the account was ever

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sold or delivered to any body. Nor is there any inventory or other proof of the personal property of *James Lamar*, from which this court might form even a conjecture that the articles charged were supplies necessarily provided by the administrator, in a due course of administration, for the sustenance, comfort or preservation of the estate confided to his charge.

The total absence of all evidence as to the nature and circumstances of the personal estate of the deceased; or that the articles consumed, for which the credit is claimed, formed any part of it; or what was the property appraised in the inventory which did not belong to him; or to whom it did belong, should have induced the orphans court to disallow voucher No. 40. Without such proof it is impossible for this court to say that the allowance claimed ought to have been made. In sanctioning such an allowance the orphans court were therefore in error. But is said that no such proof is necessary, because the articles for which a credit is claimed in this voucher being of such a nature as that they must have been consumed in their use by the legatee during her single life, and were therefore her absolute property, the appellants have no right to complain of the allowance which has been made for them. Whether they have a right to complain, or not, this court will not venture to determine, unless the entire will of the testator, *James Lamar*, be before it. In *Evans and al. vs. Iglehart and al.*, 6 *Gill & Johnson*, 174, this court have said, in determining on the rights of a residuary legatee for life with a bequest over to others, that whether the legatee for life "ought to enjoy his (the testator's) personal estate specifically, or to receive nothing more than the interest on its value, is purely a question as to the intention of the testator, in conformity to which his will must be executed, there being no unbending principle of law to control such intention, whether it be in the one way or the other." To pronounce what, in this respect, was the intention of *James Lamar*, the testator, upon a record which does not contain his will, cannot be expected of the court. But even if the will were to be found in the record, and our construction of it be what it may, it could



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Chaney vs. Smallwood.—1843.

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throw no light upon the question, nor enable us to determine on the propriety of the allowance made to the appellee for property appraised in the inventory which was no part of the personal estate of the testator.

We are prepared to ratify and affirm the decree and order of the orphans court, allowing and passing the administration account of the appellee, except the allowances in said account numbered 10, 39 and 40, and the sum of five hundred and thirty-seven dollars and eighty-six cents, being part of allowance number four in said account, and consisting of the fifth and sixth items of charge in voucher No. 4, as to which said excepted allowances and items the said decree and order of the orphans court is hereby reversed, but without prejudice to the rights of the parties in relation thereto. And this cause is to be remanded to the orphans court of *Prince George's county*, that such further proceedings may be had therein as may be necessary to carry into effect the decree of affirmance in this court; and that it may take such further evidence in relation to said excepted allowances and items as the parties may see fit to offer; and that the said court may finally order and decree thereon as the nature of the case may require. As to all costs heretofore incurred in this court, and in the said orphans court, each party shall pay its own costs.

DECREE REVERSED IN PART, AND CAUSE REMANDED.

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LEVI CHANEY vs. CHARLES SMALLWOOD.—*December 1843.*

Parties who take possession of the personal property of infants, and retain and use the same, will be considered in equity as those who enter upon and use their real estate, treated as guardians, and liable to account accordingly. Where a father died, having in his possession slaves belonging to his children, his widow, as his administratrix, took possession of them, held and claimed them as her own; while the children were minors, she married again, and the retention and use of the property was continued by the second husband and wife, until her death, and by him until the time of the decree. **Held:** that in equity he is only responsible for the conversions and hires accruing after the time of his marriage with the administratrix.

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Chaney vs. Smallwood.—1843.

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## APPEAL from the Court of Chancery.

On the 8th April 1839, *Charles Smallwood* and *Henrietta*, his wife, *Joseph Smallwood* and *Matilda*, his wife, filed their bill, alleging, that H. and M., whilst they were infants, and before their marriage, became entitled to sundry negroes, which came into the hands of *Zephaniah Mitchell*, the father of said H. and M.; that after his death, in the year 1820, his widow, *Providence Mitchell*, was duly appointed guardian to H. and M., and as such, took possession of the said negroes; that in the year 1828, P. intermarried with *Levi Chaney*, who, in virtue of his marriage, together with the said *Providence*, as guardian of the said H. and M., continued in possession, and are now in possession of some of said negroes, to wit, &c.; that in the year 1835, *L. C. and wife* sold some of said negroes, and received payment therefor: some of the said negroes were hired out, and some retained in possession of L. and P. C., before and since their marriage; that they are responsible for their reasonable hires; that H. and M. are now of full age. Prayer for a discovery and an account and delivery up of said negroes; injunction and general relief.

L. C. and wife answered this bill, and alleged, that all the negroes named in the bill are the descendants of a negro woman, slave, named *Peggy*, of whom the said *Zephaniah Mitchell* acquired the possession about twenty-five or thirty years ago; that several of the said descendants were born whilst the said Z. M. was so in possession, and that they always were used and held by him as his own absolute property; that at the death of the said Z. M., some of the said negroes were in his possession, and returned sold and accounted for by the said P. M., as the administratrix of the said Z. M.; that subsequently to the said sale, the said negroes became the *absolute property* of the said P. M., and so remained until her marriage with the said *Levi*, from which period they have remained the absolute property of the said L. and P. C., except those sold, &c. The answer then set forth the hiring of the negroes, their value, &c.; that many of them were not worth more than their support, &c., and then denied that the female

complainants, or either of them, ever were, in any manner, entitled to, or ever had, possession of the said negroes, or any of them, or that the said P. ever was appointed guardian to the said female complainants, or as such, ever took possession of the said negroes. The answer also relied on the statute of limitations as a defence to said bill.

A commission to take proof was then issued by agreement of parties, and a variety of testimony taken, which is sufficiently adverted to in the opinion of this court.

It however appeared in proof that *Matilda* was married on the 14th February 1837, and *Henrietta* on the 28th July 1836.

By an account proved on the 28th October 1829, by *Levi Chaney*, husband of *Providence Mitchell*, administratrix of *Z. M.*, before the orphans court of *Anne Arundel county*, the accountants obtained the following credit “of current money allowed this accountant for negroes *Susan, Sarah, Nell, Peg* and her child, returned in the account sales of 17th October 1825, and *not belonging to the deceased estate, and proved to the satisfaction of the court as the property of M. and H. M.*, amounting to \$221.

On the 23rd August 1836, *L. C. and wife* petitioned the orphans court for permission to correct their account of October 1829, and to be *recharged with the said negroes* as the property of *Z. M.*, which was so ordered, and an account on that basis was passed and sworn to.

On the 23rd March 1842, the Chancellor (BLAND) decreed, “that the defendant, *Levi Chaney*, forthwith deliver up unto the plaintiffs, *Charles Smallwood* and *Henrietta*, his wife, and *Joseph Smallwood* and *Matilda*, his wife, the negro woman slave *Peggy*, and her children and descendants or increase, in the bill of complaint mentioned, and which, or any of them, are now in the possession or under the control of the said defendant. And also, that the defendant, *Levi Chaney*, account with the said plaintiffs of and concerning the hires and profits of all and each one of the said negro slaves, which may have come into the hands and been in the possession of the said *Levi Chaney* and the late *Providence*, his wife, or either of them,



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from the death of the said *Zephaniah Mitchell* until the delivery of the said negro slaves unto the said plaintiffs, as hereinbefore directed ; and, moreover, that the said *Levi Chaney* account with the said plaintiffs of and concerning the full value of the said negro slaves, or any of them, which have been sold or disposed of and not delivered as hereinbefore directed. And this case is hereby referred to the auditor with directions to state an account accordingly from the pleadings and proofs now in the case, and such other proofs as may be laid before him. And the parties are hereby authorised to take testimony in relation to the said account before any justice of the peace, on giving three days notice as usual : provided, that such testimony be taken and filed in the chancery office, in this case, within one month after the delivery of the said slaves as hereinbefore directed."

From which decree *Levi Chaney* appealed.

The cause was argued before STEPHEN, ARCHER, DORSEY and SPENCE, J.

By RANDALL for the appellant, and

By ALEXANDER for the appellee.

SPENCE, J., delivered the opinion of this court.

Of the questions raised in this cause, the first of which we shall attempt to dispose of, is that of jurisdiction.

This court, in *Drury vs. Conner*, 1 Har. & Gill, 220, decided that "whoever enters upon the estate of an infant is considered in equity as entering as guardian for such infants, and after the infant comes of age he may, by bill in chancery, recover the rents and profits. And if a person so entering shall continue the possession after the infant comes of age, chancery will decree an account against him as guardian, and carry on such account after the infancy is determined." And this doctrine is sanctioned and maintained by the cases of *Burnett vs. Whitehead*, 2 P. Wms. 645 ; *Morgan vs. Morgan*, 1 Atkins, 489 ; and *Dormer vs. Fortescue*, 3 Atkins, 130. We cannot distinguish in principle the case now before us

from that of *Drury vs. Conner*. The bill in this case charges that when the complainants were infants the respondent took possession of the negroes in controversy and held and received the profits of them up to the time of filing the bill. We are unable to discover any sound reason to exclude the jurisdiction of courts of equity from affording similar relief in relation to personal estate, as it is adjudged they have in regard to the rents and profits of real estate, where infants are the parties complainants in both cases. Believing that there is no such distinction, we determine that courts of equity have jurisdiction in such cases.

The next question is as to the right of property. The testimony is obscured by the clouds which are thrown over the characters of some of the witnesses by impeachment, but we think there remains enough untarnished to satisfy our judgments conclusively that the negroes mentioned in the proceedings belong to the complainants. The circumstances and facts of the case, the declarations of *Chaney*, and especially his acts in the orphans court of *Anne Arundel county*, might satisfy any impartial mind, that these negroes were the property of the complainants.

The admissions of *Chaney* are abundantly sufficient to take the case out of the statute of limitations.

We think the Chancellor erred in decreeing the defendant, *Levi Chaney*, to account with the plaintiffs for the hire and profits of the negro slaves from the time the same came into the possession of *Levi Chaney*, and the late *Providence*, his wife, or either of them.

This court therefore reverse this decree in this particular, and will sign a decree that the said *Levi Chaney* account for the hire and profits of the negro slaves from the time said *Chaney* intermarried with *Providence Mitchell*.

DECREE REVERSED IN PART.

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Boarman *vs.* Israel and Patterson, ex'rs.—1843.

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IGNATIUS BOARMAN *vs.* HENRY PATTERSON AND FIELDER  
ISRAEL, EXECUTORS OF HENRY PETERS.—*December 1843.*

After a judgment of condemnation has been rendered in an attachment cause, if the defendant desire to move to quash the writ, regularly he should first move to strike out the judgment, and then make his motion to quash.

Without the short note showing the plaintiff's cause of action, and the issuing thereon of a *capias ad respondendum* or a summons, (as the case may be,) the proceedings in an attachment would be wholly irregular.

Nothing ought to be recovered by a condemnation of the property attached, which was not recoverable from the defendant, had he given special bail, and appeared to the process issued against him.

Where the short note states a cause of action in *assumpsit*, and the writ issued was in trespass upon the case, matters for which debt or covenant was the only remedy could not be recovered.

A short note cannot be amended from *assumpsit*, to debt or covenant, where the writ is in trespass upon the case.

It is no ground for quashing an attachment that some specific portions of the claim as made could not be recovered under the short note.

Where the creditor deposes "that he is credibly informed, and verily believes, that the said J. B. (the debtor) has removed from his place of abode with intent to injure and defraud his creditors," this is a sufficient compliance with the act of 1795, ch. 56, sec. 1, in that particular.

A judgment on attachment which not only condemns property towards satisfying that portion of a plaintiff's demand which might be recovered under the short note, but also to satisfy that which could not be so recovered, is erroneous.

Where the plaintiff exhibits a claim for principal, and with interest added, up to a given day, it is error in the county court to enter up a condemnation for the gross sum as bearing interest from the day on which the attachment issued. The charge of interest upon the interest was not warranted under such circumstances.

This court will not reverse a judgment of condemnation in an attachment cause upon an appeal from such judgment, for errors which do not appear to have been presented to the consideration of the county court, or that it made any decision in relation thereto.

Where a special limited jurisdiction, distinct from and not embraced by its general jurisdiction, is conferred by act of Assembly on any tribunal, its powers to act as it has done must appear upon the face of its proceedings.

When those proceedings are brought for review in this court, it must appear from their inspection, that every thing has been done which the law required, as the basis of the authority which has been exercised.

The act of 1825, ch. 117, interposes no obstructions to enquiries into such a subject. It has no application to them.



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Boarman vs. Israel and Patterson, ex'rs.—1843.

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Under the act of 1795, ch. 56, sec. 1, unless the affidavit of the creditor contain an averment of citizenship as to both creditor and debtor, no attachment against an absconding debtor can lawfully issue.

The act of 1834, ch. 76, sec. 1, dispensed with the averment of citizenship of the plaintiff; *provided*, that if any trial take place it be proved that the plaintiff or plaintiffs, or any of them, at the time of issuing the attachment was or were a resident or inhabitant, or residents or inhabitants, of one of the United States of America, or of a District or Territory thereof.

But where the affidavit is designed to procure a warrant for an attachment against the effects of an *absconding debtor*, under the act of 1795, and does not contain an averment of his citizenship of *Maryland*, it is substantially defective; and upon an appeal from a judgment of condemnation rendered upon it, without a motion to that effect in the county court, the judgment will be reversed and the attachment quashed.

APPEAL from *Baltimore County Court*.

This was an attachment to compel an appearance, commenced on the 15th January, 1841, on the following proofs and proceedings, to wit:

“*State of Maryland, city of Baltimore, to wit:* Be it remembered, that on this fifteenth day of January, in the year one thousand eight hundred and forty-one, before me, the subscriber, a justice of the peace of the State of *Maryland*, in and for said city, personally appeared *Fielder Israel*, a citizen of the State of *Maryland*, and made oath on the Holy Evangely of Almighty God, that *Ignatius Boarman*, late of *Baltimore* county, is justly and bona fide indebted unto him, the said *Fielder Israel* and *Henry Patterson*, executors of *Henry Peters*, late of said county, deceased, in the sum of three thousand two hundred and fourteen dollars twenty-eight cents, over and above all discounts. And at the same time the said *Fielder Israel* produced to me an account, with sundry notes, bills and obligations, on and by which the said *Ignatius Boarman* is so indebted, which are hereto annexed; and the said *Fielder Israel* did also make oath, that he is credibly informed and verily believes, that the said *Ignatius Boarman* has removed from his place of abode, with intent to injure and defraud his creditors.

“Sworn before *T. Hanson Belt*, a justice of the peace of the State of *Maryland*, in and for the city of *Baltimore*.”

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 Boorman *vs.* Israel and Patterson, ex'rs.—1843.
 

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*"Ignatius Boorman to Henry Patterson and Fielder Israel, ex-ecutors of Henry Peters, deceased.*

To your note dated 1st of March 1836, for	\$400 00	
Interest thereon from 1st Sept. 1837,	80 80	
	<hr/>	\$480 80
To your due bill, dated 26th March 1836,		
for - - - - -	375 00	
Interest thereon from 1st Sept. 1837,	75 75	
	<hr/>	450 75
To your note dated 6th Nov. 1835, for	1,000 00	
Interest thereon from 1st Sept. 1837,	202 00	
	<hr/>	1,202 00
To your note under seal, dated 12th May		
1827, for - - - - -	800 00	
By cash, - - - - -	350 00	
	<hr/>	450 00
Interest thereon from 1st Sept. 1837,	90 90	
	<hr/>	540 90
To your obligation and receipts, dated		
27th March 1827, - - - - -	400 00	
Interest thereon from 1st Sept. 1837,	80 80	
	<hr/>	480 80
To your due bill, dated 9th Jan. 1838,	50 00	
Interest thereon from date, - - - - -	9 03	
	<hr/>	59 03
		<hr/>
		\$3,214 28

N. B.—Interest calculated to 13th Jan. 1841."

"\$400. *Baltimore*, March 1st, 1836. Twelve months after date, I promise to pay *Henry Peters*, or order, four hundred dollars, for value received, with interest.

IGNATIUS BOARMAN."

"375. *Baltimore*, May 26th, 1836. Balance due *Henry Peters*, on a note I have for collection on the *C. Nuns*, in Old Town, three hundred and seventy-five dollars, principal and interest.

IGNATIUS BOARMAN."

"1,000. *Baltimore*, Nov. 6th, 1835. Twelve months after date, I promise to — *Henry Peters*, or order, one thousand dollars, for value received.

IGNATIUS BOARMAN."

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“*Baltimore*, May 12th, 1837. On this first day of September, eighteen hundred and thirty-one, I promise to pay *Henry Peters*, or order, the sum of eight hundred dollars, with legal interest thereon, commencing on the first of September next, payable half-yearly, for value received, the first half-years' interest becomes due on the first day of March, eighteen hundred and twenty-eight.      *IGNATIUS BOARMAN*. (Seal.)”

Witness,—*Thomas Moore*.

(Endorsed.) “350. *Baltimore*, Nov. 20th, 1829. Paid three hundred and fifty dollars on the within bond, and interest on the said three hundred dollars, and interest on the balance up to the first of September last, for which *Boarman* has a receipt. 800=350—450 balance due.”

The plaintiff also exhibited as a part of his claim a covenant under the seal of the said I. B., by which *Peters* agreed to lease him a lot, and B. to build two houses thereon, with receipts endorsed thereon by B. for \$400.

“To the clerk of *Baltimore* county court: *Mr. Kell*, you are hereby required, on receipt of this warrant and the above oath and annexed vouchers on which the same is granted, to issue an attachment against the lands, tenements, goods, chattels and credits of the said *Ignatius Boarman*, to answer unto the said *Felder Israel* and *Henry Patterson*, executors of *Henry Peters*, deceased, the above mentioned sum of three thousand two hundred and fourteen dollars twenty-eight cents, current money, and cost of this attachment, according to the acts of Assembly in such case made and provided; and this warrant shall be your sufficient authority therefor. Given under my hand and seal this fifteenth day of January, in the year eighteen hundred and forty-one.      *T. HANSON BELT*, (Seal.)

Justice of the peace in and for the city of *Baltimore*.”

Thereupon the said *Henry Patterson* and *Felder Israel*, &c. prosecuted out of the county court here, the writ of attachment, in form following, to wit:

“The State of *Maryland*, to the sheriff of *Baltimore* county, greeting: Whereas, *Thomas Hanson Belt*, esquire, one of the justices of the peace for *Baltimore* city, hath this day issued



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his warrant to the clerk of said county, directing him to issue attachment against the lands, tenements, goods, chattels and credits of *Ignatius Boarman*, to answer unto *Fielder Israel* and *Henry Patterson*, executors of *Henry Peters*, deceased, the sum of three thousand two hundred and fourteen dollars twenty-eight cents: We therefore command you, that you attach the lands, &c., to the value of three thousand two hundred and fourteen dollars twenty-eight cents, current money, and cost of this attachment, according to the form of the act of Assembly in such case made and provided. And we further command you, that by, &c. &c. Issued the 15th day of Jan. 1841.

THOMAS KELL, clerk."

The plaintiffs also sued out a writ of *trespass upon the case*, against the said I. B., and filed the following short note, to wit:

"*Fielder Israel* and *Henry Patterson*, executors of *Henry Peters*, against *Ignatius Boarman*, action of *assumpsit* in *Baltimore* county court.

"This suit is instituted to recover the sum of three thousand two hundred and fourteen dollars twenty-eight cents, due and owing from the defendant to the plaintiffs, as executors of *Henry Peters*, deceased, on a note of defendant for \$400, dated 1st March 1836, payable to said deceased, twelve months after date; on another note of defendant for \$1,000, payable to said deceased twelve months after date; on a due bill of defendant for \$375, dated 26th May 1836; on another due bill for \$50, dated 9th Jan. 1838; on a single bill of defendant to deceased for \$800, payable on the first September 1831, dated 12th May 1827; and, on the obligation and receipt of defendant to deceased for \$400, payable 1st September 1832, with interest thereon.

J. PENNINGTON, plaintiff's att'y."

The sheriff returned the attachment, to wit:

"Laid in the hands of *William J. Boarman* and *Ignatius Boarman*, junior, the 21st of January 1841, in the presence of *Samuel R. Hiser* and *John Gallagher*, and attached as per schedule.

WILLIAM D. BALL, sheriff."

Which said schedule is in form following, to wit:

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“A schedule of the goods and chattels, lands and tenements of *Ignatius Boarman*, seized and taken at the suit of *Fielder Israel* and *Henry Patterson*, executors of *Henry Peters*, by virtue of a writ of attachment issued out of *Baltimore* county court, to the sheriff thereof directed, and appraised by us, the subscribers, who first being duly summoned and sworn for that purpose. Given under our hands and seals, this 20th day of January 1841.

1 lot of ground fronting on the south side of *Little Hughes*,”  
&c. &c.

And the sheriff aforesaid also makes return to the court here, of the said last mentioned writ, thus endorsed, to wit :  
“N. E., copy set up.”

Neither the defendant, I. B., nor the garnishee appearing, upon the prayer of the plaintiff: “Therefore it is considered by the court here, that the lands and tenements aforesaid, of the said *Ignatius Boarman*, so as aforesaid attached, be condemned according to the act of Assembly in such case made and provided, towards satisfying unto the said *Henry Patterson* and *Fielder Israel*, executors as aforesaid, as well the sum of three thousand two hundred and fourteen dollars and twenty-eight cents, current money, in the writ of attachment aforesaid specified, with interest from the fifteenth day of January, eighteen hundred and forty-one, as the sum of thirteen dollars eighty-six and two-third cents, by the court here, unto the said *Henry Patterson* and *Fielder Israel*, executors as aforesaid, on their assent adjudged, for their costs and charges by them, about their suit, in this behalf expended.”

Whereupon at the same term comes into court here, the said *Ignatius Boarman*, by, &c., and moves the court here, to quash the writ of attachment aforesaid, and files in court here, in said cause, the following motion and reasons, to wit :

1st. Because in the said suit are embraced different pretended causes of action, some of which ought to have been sued upon in assumpsit, and others thereof in debt, and one thereof in covenant.

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2nd. Because the sum of money claimed to be due from the defendant to the plaintiffs, for which said attachment issued, is composed of various amounts mentioned in several promissory notes, due bills and single bills, and one action of assumpsit was brought thereon, embracing the whole pretended claim.

3rd. Because causes of action of a different nature are embraced in the said attachment, and together compose the amount claimed in the said attachment, as due from the defendant to the plaintiffs.

4th. Because the said attachment and the proceedings in the said case, are otherwise, and in other respects, informal and invalid.

The defendant, as an additional reason for quashing the attachment in this cause, urges: That the proceedings do not disclose upon their face a compliance with the requisites of the act, in this, that they do not aver the defendant has actually runaway, absconded or fled from justice, or secretly removed himself or herself, from his place of abode, with intent to evade the payment of his just debts.

The motion to quash being overruled by the county court, the defendant prayed an appeal from the judgment of condemnation and from the overruling his motion to quash the attachment.

The cause was argued before STEPHEN, DORSEY, CHAMBERS and SPENCE, J.

By T. P. SCOTT for the appellant, and  
By WILLIAM F. FRICK for the appellees.

DORSEY, J., delivered the opinion of this court.

We cannot say the county court erred in overruling the motion, there made, to quash the attachment. The appellant never appeared, or made such motion, until after the judgment of condemnation was rendered by the court. Instead therefore of an application to quash the writ of attachment, his motion should have been first to strike out the judgment, and then to quash the attachment. Until the judgment was strick-



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en out the court could, with no consistency, be asked to quash the writ of attachment, upon which it was founded. But, waving this objection to the regularity of the appellant's motion, let us enquire whether the reasons assigned by him were such as would have justified the court in gratifying his request?

The first reason assigned as a ground for quashing the attachment, is that "in the suit are embraced different causes of action, some of which ought to have been sued upon in assumpsit, and other thereof in debt, and one thereof in covenant." The decision of this court, in the case of *Dawson vs. Brown*, 12 Gill & John. 53, is decisive upon this point. It is there decided that it is not necessary that a creditor should recover the whole amount of his claim for which the attachment issued. The attachment may be good and available to him for a part of his claim, though wholly unavailable as to the residue. Without the short note showing the plaintiff's cause of action, and the issuing thereon of a *capias ad respondendum* or a summons, (as the case may be,) the proceedings in the attachment would be wholly irregular. Nothing ought to be recovered by a condemnation of the property attached, which was not recoverable from the defendant, had he given special bail and appeared to the process issued against him. The short note states the cause of action to be in assumpsit, and the writ issued was in trespass on the case. For all that part of the appellee's claim, therefore, for the recovery of which an action of debt or covenant was the only remedy, the present proceedings in attachment furnished no remedy. Their short note or declaration, by no amendment which could have been made to it, could be made to embrace claims recoverable only in debt or covenant. It must conform to the writ; of which there could be no amendment, changing the nature of the action. No portion of the claim of the appellee's was recoverable under the proceedings before us, except that for which an action of assumpsit was the appropriate remedy. To this extent the appellees were entitled to recover, and consequently the county court could not, for the reason assigned, have quashed

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the writ of attachment, no matter at what stage of the proceedings the motion for that purpose might have been made.

The second and third reasons assigned for quashing the attachment are but reiterations of the first, and consequently are disposed of by the views we have hereinbefore expressed. The fourth reason is so vague and indefinite, that it presents no point which this court are enabled to say, was determined by the court below, and for that vagueness and uncertainty was properly overruled by it, and regarded as a nullity. The additional reason, which was filed for quashing the attachment, was in these words: "That the proceedings do not disclose upon their face a compliance with the requisites of the act, in this, that they do not aver the defendant had actually runaway, absconded, or fled from justice, or secretly removed himself or herself, from his place of abode, with intent to evade the payment of his just debts." It is true that the affidavit in the case before us contains no such averment, but it is equally true that such an averment is not an indispensable requisition to the issuing of an attachment. The provision of the act of Assembly has been, in this respect, if not to the letter, at least substantially complied with. The creditor has sworn "that he is credibly informed, and verily believes, that the said *Ignatius Boarman*, (the debtor,) has removed from his place of abode, with intent to injure and defraud his creditors." Which is all that the act of Assembly in that respect requires.

Had the reasons assigned in the county court, for quashing the attachment, been preferred in the most appropriate stage of the cause, we see nothing in the specific grounds relied on in the motion that could have sustained it. The county court therefore committed no error in overruling it. But the present appeal is not only taken to the order of the court, overruling the motion, but to the judgment of condemnation which has been rendered in the cause. For the reversal of this judgment we see in the record sufficient grounds, if in accordance with the act of 1825, ch. 117, it sufficiently appeared, that the county court had before entering the judgment, or subsequently on a motion to strike it out or amend it, (had such motion

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been made,) decided upon the sufficiency of those grounds. This judgment we think erroneous because it condemned the property attached not only towards satisfying that portion of the appellees' claim which was recoverable in an action of assumpsit; but also that portion thereof which could only have been recovered in an action of debt or covenant. And waiving this error, it was also erroneous because it added the interest to the principal on all the claims up to the fifteenth day of January, 1841, and from that time awarded interest to be paid on the gross sum so ascertained. Thus compounding the interest, or charging the appellant with the payment of interest upon interest, a charge, in proceedings like the present, not warranted by any act of Assembly or principle of law of which we are apprised. But for these errors, we are not at liberty to reverse the judgment, it not appearing that they were presented to the consideration of the county court, or that it made any decision in relation thereto. *Sasscer vs. Walker's ex'rs.*, 5 *Gill & Johns*. 102.

The appellant, however, claims a reversal of the judgment before us, for other reasons than those we have mentioned: First, "because there is no averment of the citizenship of *Patterson*, one of the plaintiffs;" and, secondly, "because there is no averment of the citizenship of the defendant." These points were not raised in the court below, nor does it appear that they were considered or determined by it. Nevertheless, notwithstanding the act of 1825, they are, in this case, fit subjects for review in this court. Where a special limited jurisdiction, distinct from and not embraced by its general jurisdiction, is conferred by act of Assembly on any tribunal, its power to act, as it has done, must appear upon the face of its proceedings. And when those proceedings are brought up for review in this court, it must appear from their inspection, that every thing has been done which the law required as the basis of the authority that has been exercised. To our enquiries into such a subject the act of 1825 interposes no obstructions; it has no application to them. That such is the doctrine of this court in relation to the two defects now under considera-



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tion we think fully appears by the case of *Bruce and Fisher vs. Cook, garnishee of Scarborough*, 6 G. & J., 348—where, in the court's opinion, it is said, that if there be error in the proceedings on which an attachment had issued, by reason of which the jurisdiction of the court did not appear, "it would have been a fatal objection after verdict on a motion in arrest of judgment." That the garnishees "might have taken advantage of it, if a jury had been sworn, by a prayer for the instruction of the court; or, after verdict and judgment against them, without raising the objection below, it might, on appeal or writ of error, have been assigned as error here, and this court would have taken notice of and sustained it." To show the materiality of the omissions here complained of, it is only necessary to refer to the act of 1795, ch. 56, sec. 1; under which, unless the affidavit contain such averment of citizenship, as to both creditor and debtor, no attachment against an absconding debtor can lawfully issue; no judgment of condemnation can be rendered by the county court. Those facts not appearing in the affidavit, neither the magistrate who issued the warrant, nor the county court, have any jurisdiction over the subject matter: the whole proceedings would be irregular and ought to be quashed. So stood the law under the act of 1795. But by the act of 1834, ch. 76, sec. 1, it is enacted "that no attachment that shall hereafter be issued by virtue of the act to which this is a supplement or of any of the supplements thereto, shall fail, be dismissed, quashed or defeated, because of any defect in any averment, as to the citizenship or residence or inhabitancy of the plaintiff or plaintiffs or any of them, or because of any omission altogether of averment in that respect in the affidavit for such attachment, or in any act or any part of the proceedings preliminary to such issuing of attachment; provided that if any trial take place it be proved at the trial in such attachment case that the plaintiff or plaintiffs, or any of them, at the time of issuing said attachment, was or were a resident or inhabitant or residents or inhabitants of one of the *United States of America*, or of a District or Territory thereof." By this act of Assembly, under

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the circumstances in which this case stands before us, we think the appellant cannot claim a reversal of the judgment, or that the proceedings on which it is founded be quashed, by reason of the omission of the averment of citizenship as to one of the plaintiffs. The design of this act of Assembly was to protect plaintiffs from the effects of the omissions enumerated until a trial should take place, at which the omission complained of could be supplied by proof. The infirmity in the affidavit, as to the citizenship of the defendant, remains unhealed by any legislative act, and compels us to reverse the judgment of the county court, and to quash the writ of attachment on which it is founded.

JUDGMENT REVERSED AND ATTACHMENT QUASHED.

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ANDREW HALL AND WIFE vs. CHARLOTTE HALL AND OTHERS.  
*December 1843.*

It is a general rule that, if the answer to a bill denies the existence of *any* parol contract for the sale of lands, and insists upon the benefit of the statute of frauds, the case cannot be made out by parol proof, and the bar of the statute is complete: but there is an exception to this rule, resulting from a part performance of the contract, established by many decided cases.

The evidence of part performance of a parol contract for the sale of lands, in the delivery of possession, or payment of purchase money, need not to be in writing, where such evidence is admissible as acts of part performance, to take a case out of the statute of frauds.

The statute of frauds was designed to exclude oral evidence of the agreement of sale; not oral evidence of the acts of part performance, or things done in execution of the agreement.

Where a complainant relies upon acts of part performance, to take a parol agreement for the sale of lands, (denied by the answers,) out of the operation of the statute of frauds, it is his duty to offer full and satisfactory evidence of the terms of such agreement, and of the performance of it on his part, to entitle him to a decree for specific execution.

APPEAL from the Court of Chancery.

The amended and supplemental bill in this cause was filed on the 6th July, 1836, by the appellants, and alleged that in the year 1815, *Aquila Hall* died, having executed his last will,

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whereby he devised to his widow, *Ann Hall*, for life, a valuable real estate and some personal property; after the decease of his wife, remainder to his daughters, *Charlotte* and *Maria Hall*, in fee. The will also contained various devises of specific parcels of real property to his children respectively, except *Delia*, who had intermarried with a certain *Philip Moore*, and his son, *Edward C. Hall*; and to *Delia Moore* he devised \$5,000 out of certain real estate directed by his will to be sold, and the residue of the money arising from such sale to be applied to the use of his son *Edward C. Hall*. A copy of the will was exhibited with the bill of complaint.

The bill then alleged, that the real estate, when sold, produced nothing for *Edward*, who was in fact left unprovided for, and that in order to equalise the bequests of said testator, and to prevent an entire failure of his intentions, and wishes in respect to the said *Edward*, his mother, the said *Ann Hall*, and his sisters, the said *Charlotte* and the said *Maria*, to whom the largest and most valuable parts of the testator's estate were devised, agreed to give, and did give, to him the said *Edward*, the lands and premises particularly mentioned and described in the original bill in this cause, and placed him in possession thereof as the absolute owner in fee; that the said *Edward* had in actual possession, used, enjoyed and claimed as sole owner, for many years, the said land and premises, under and in virtue of the said gift, and that while he was so possessed thereof and holding himself out to the public as the absolute proprietor, to wit, during the year 1825, he sold the lands and premises to the said *Philip Moore*, for a valuable consideration, to wit, \$4,000, and received from said *P. M.*, at various times, the whole amount of purchase money; and the complainants charged that the said sale was made with the knowledge, acquiescence and assent of the said *Ann*, *Charlotte*, and *Maria*, and that they were apprised of the consideration and payment of the purchase money by said *Moore*, and acquiesced in the same; that in the year 1825 the said *E. C. H.* transferred on the public records of the levy court or commissioners of *Baltimore* county the said lands and premises to *P. M.*, and that



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the said *Moore* had before been and was then placed in the quiet possession of the said estate, and always afterwards, up to the period of his decease, continued peaceably to possess and enjoy the same, and to pay all the county taxes and assessments thereon; and they expressly charge that at no time during the said possession of said estate by said *Edward*, or at the time he transferred the possession thereof to the said *Moore*, or afterwards, during the life of the said *Moore*, did either the said *A. C.* or *M.*, or either of them, ever claim the said estate, or pretend to have any title thereto, or in any manner question the validity of the said *P. M.*'s purchase, but on the contrary the said *A. C.* and *M.* all promised and agreed to convey the said estate to the said *P. M.* The bill then proceeded to allege various other circumstances, resting on parol proof, by which the title of the said *P. M.* had been virtually admitted by the defendants, and alleged his death intestate, the wife of the complainant *Andrew*, being *his only* child. The bill prayed for a discovery and conveyance from the appellees, and for general relief.

The answer of *Charlotte* and *Maria Hall*, denied that they, or either of them, or *Ann Hall*, their mother, ever gave, or agreed to give, the said lands and premises to the said *Edward C. Hall*, with the views alleged in the bill, or "on any account whatever," or that they ever placed him in possession as absolute owner; that he never held or owned the lands in that character, nor claimed them as, or held himself out to be, absolute owner thereof. They deny that he ever attempted to sell, or sold, the said lands to *P. M.*, or that the said *P. M.* ever paid him any money on that account. The answer also denied knowledge, assent, or acquiescence, as imputed to them in the bill. They allege that *E. C. H.* had only possession for two years as tenant of *Ann Hall*, upon whose death the possession of the said lands vested in these defendants, and has so continued ever since. The answer also denied any agreement to convey to *P. M.*, or that he was ever in possession, with their consent.

The answer of *Edward C. Hall*, corresponded in substance with the answers of his sisters, *C. and M.*

On the 21st April, 1842, the Chancellor, (BLAND,) after much testimony taken, on which the cause had been argued before him by the defendants, being of opinion that there was "no proof of any written agreement, nor any evidence of an adequate part performance of any parol contract for the conveyance of the real estate in the proceedings mentioned from the defendants, or any of them, to the ancestor of the plaintiff, *Ann G. Hall*," decreed that the bill be dismissed with costs.

From this decree the complainants appealed to this court.

The cause was argued before STEPHEN, DORSEY, CHAMBERS and SPENCE, J.

By N. WILLIAMS for the appellants, and

By W. SCHLEY and R. N. MARTIN for the appellees.

DORSEY, J., delivered the opinion of this court.

The first point relied on by the appellees is not disputed, and on an inspection of the record, is a self-evident proposition. It simply asserts, "that there is no proof of any written agreement for the conveyance of the real estate, mentioned in the said proceedings, by the appellees to *Philip Moore*, the ancestor of *Ann G. Hall*, one of the appellants."

The second point on which one of the solicitors of the appellees has very confidently relied is, "that the existence of any parol agreement for the conveyance of the said estate, as alleged in the bill of the appellants, being denied by the appellees in their answer to the said bill, and the appellees having insisted on the benefit of the statute of frauds, the statute constitutes a complete bar to the relief prayed for by the bill, and that it was not competent for the appellants to make out a case by parol evidence."

To sustain this proposition, which if sustainable, would interpose an insuperable bar to the relief sought by the bill, several authorities have been cited; but that most strongly pressed upon the court, is the general rule upon the subject, stated by

*Justice Story in the 2nd vol. of his Equity Jurisprudence*, 60, sec. 758, where, in speaking of the validity, in a court of equity, of a parol agreement for the sale of land, &c., under the 4th sec. of the statute of frauds, he says, "it follows from what has been already said, that if the answer denies the existence of any parol contract, and insists upon the benefit of the statute, the case cannot be made out by parol evidence; and that the bar is complete." In thus stating a general rule applicable to the operation of the statute, to impute to the learned commentator a design to overrule all the cases that established an exception to the rule resulting from a part performance of the contract, would be doing him great injustice. Such exception being upon authority as universally recognized and sanctioned as the general rule which he so clearly announced. And that such was not his meaning and intention, is obvious from his succeeding section, (No. 759,) which he commences by saying: "In the next place, courts of equity will enforce a specific performance of a contract within the statute, where the parol agreement has been partly carried into execution. The distinct ground upon which courts of equity interfere in cases of this sort, is that, otherwise one party would be enabled to practice a fraud upon the other; and it could never be the intention of the statute to enable any party to commit a fraud upon another with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statute are promoted instead of being suppressed by such a jurisdiction for discovery and relief." Upon all principles of fair construction, therefore, the reverse of the doctrine contended for as aforesaid, by one of the solicitors of the appellees, is established by the sections of the commentaries of *Justice Story*, to which we have referred. And no support whatever is given to the position thus insisted on for the appellees, by any of the authorities referred to as sustaining it, unless it be the case of *Givens vs. Calder*, 2 *Desausure*, 190; to the doctrines of which case, (as applicable to the case before us,) if rightly interpreted by the solicitor of the appellees, we announce our unqualified dissent, regarding



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them as in conflict with all the established adjudications upon the subject. In the case of *Givens vs. Calder*, the vendor and vendee were dead, and the complainants were the contracting agent of the vendee and his wife, who was the residuary devisee of the purchaser. The respondent, the heir of the vendor, did not deny the agreement alleged, but his knowledge of it, or the assent of the vendor to the delivery of the possession, and says he therefore cannot admit it and pleads the statute of frauds. *Chancellor Rutledge*, who delivered the opinion of the court, says: "we are clearly of opinion, that in the case of a parol agreement, not tainted with fraud, if the defendant chooses to avail himself of the statute, it is not necessary that he should by answer confess or deny the agreement, the law having declared it void. Neither ought he to be compelled to confess or deny part performance of it, although charged in the bill. That to permit parol evidence of a parol agreement, would be in effect to repeal the statute, and introduce all the mischief, inconvenience and uncertainty it intended to prevent. That to admit parol proof of part performance of a parol agreement would be equally improper, and is not warranted by any of the cases in the books; for it is clearly held, that if the part performance alleged, be possession of land or the payment of money, the complainant must prove delivery of possession in the first case, or receipt or written evidence of payment in the other, to entitle him to a specific execution of the agreement. All the parol testimony, therefore, which has been adduced in the case to prove the parol agreement, or the part performance of it, is made inadmissible, and must be laid aside." "The case thus standing without proof on the part of complainant, the facts of part performance, namely, payment of part of the purchase money, and delivery of possession not being admitted, but denied by the answer as fully and explicitly as defendant could do so, the bill must be dismissed with costs."

If in this opinion the court meant to assert, that by the statute of frauds the evidence of part performance of a parol contract, in the delivery of possession or payment of the purchase money must be in writing, to such an assertion we cannot

yield our assent. From the very nature of the act of delivering possession, written evidence of it rarely, if ever, exists. It is in its nature a matter *in pais*, of which written evidence is not to be predicated. The admission or denial by the answer, of the acts of part performance, does not affect or in any wise change the statutory bar to the relief prayed. The statute was designed to exclude oral evidence of the agreement of sale, not oral evidence of the acts of part performance or things done in execution of the agreement. The payment of the purchase money stipulated by the contract may be proved by oral testimony, as well where the agreement is reduced to writing, as where it rests wholly in parol. In reference to the proof, by which such payments are to be established, the statute referred to has made no provision. The same may be said of the act of part performance, by the delivery of possession, or of the expenditures made, or improvements erected in virtue of the agreement.

To refer to authorities to shew that courts of equity will decree the specific performance of an oral agreement, on the ground of part performance, may well be regarded at this day as an useless waste of time; but as the contrary doctrine, as applicable to the circumstances of the case, has been so confidently urged by one of the solicitors of the appellee, it may not be out of place, perhaps to advert to a few of such authorities. 1 *Fonb. Eq.*, ch. 3, s. 8, 153, in commenting on the statute and the decreeing of the specific execution of verbal contracts, states that, "so if it be carried into execution by one of the parties, as by delivering possession, and such execution be accepted by the other, he that accepts it must perform his part; for where there is performance the evidence of the bargain does not lie merely upon the words, but upon the fact performed, and it is unconscionable that the party that has received the advantage should be admitted to say, that such contract was never made."

In *Roberts on Frauds*, 131, it is stated, that the relief against the statute in the cases of part performance was originally founded on fraud.

In *Phillips vs. Thompson*, 1 *John. C. C.* 132, Chancellor Kent says, "the ground of the interference of the court is not simply that there is proof of the existence of a parol agreement, but that there is fraud in resisting the completion of an agreement partly performed;" and in *Hamilton vs. Jones*, 3 *G. & J.* 127, this court have said, "the ground upon which Chancery interposes its aid, in the case of a clear part performance of a verbal agreement, is, that to withhold relief would be to suffer a party seeking to shelter himself under the statute of frauds, himself to commit a fraud."

This doctrine of decreeing the specific execution of verbal contracts, in part performed, is also fully recognised and established by *Lindsay vs. Lynch*, 2 *Sch. & Lef.* 1. *Morphett vs. Jones*, 1 *Swanst.* 172. *Frame vs. Dawson*, 14 *Ves.* 386. *Ex parte Hooper*, 19 *Ves.* 479. *Caldwell and others vs. Carrington's Heirs*, 9 *Peters*, 86. *Phillips vs. Thompson*, 1 *John. C. C.* 132. *Graham and wife vs. Yates and Meyer's Heirs*, 6 *H. & J.* 229; and *Moale and others vs. Buchanan and others*, 11 *G. & J.* 314, and a host of other cases, almost without number, to which it is unnecessary to refer.

It was insisted by the appellee's solicitor that the specific execution of a parol agreement had in no case been decreed where, by the answer, the fact of the agreement was denied, and the statute pleaded. A reference to the authorities will at once shew that this position cannot be sustained.

In *Morphett vs. Jones*, 1 *Swanst.* 172, the bill was filed for the specific performance of an oral contract for a lease of land for twenty-one years. The answer denied the agreement, also the acts charged to have been done in part execution of the agreement, and pleaded statute of frauds. The master of the rolls decreed the specific performance of the contract, and in delivering his opinion says, "the plaintiff has established a parol agreement in part performed."

A party, who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed. In *Caldwell and others vs. Carrington's Heirs*, 9 *Pe-*



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ters, 86, the bill sought the specific performance of a verbal contract in behalf of one who had partly performed. The answers denied the contract and pleaded the statute of frauds. The specific performance was decreed. *Chief Justice Marshall*, in delivering the opinion of the court, saying: "if, therefore, it be clearly shewn what the agreement was, and that it has been partly performed, that is, that an act has been done, not a mere voluntary act, or merely introductory or ancillary to the agreement, but a part execution of the substance of the agreement, and which would not have been done unless, on account of the agreement, an act, in short, unequivocally referring to, and resulting from, the agreement, and such that the party would suffer an injury, amounting to fraud, by the refusal to execute that agreement, in such case the agreement will be decreed to be specifically performed." And the reverse of the doctrine insisted on by the solicitor of the appellees is clearly conceded or admitted by necessary implication, in the cases of *Lindsay vs. Lynch*, 2 Sch. & Lef. 1. *Frame vs. Dawson*, 14 Ves. 386, and in the cases decided by this court of *Graham and wife vs. Yates and Meyer's Heirs*, 6 H. & J. 229.

No principle is better settled, than that by no device or form of proceeding or solemnity of the instruments, or means used for its perpetration or concealment, can you deprive a court of equity of the power of "unkennelling a fraud." To permit a defendant, when charged with fraud, to shield himself from a disclosure by a denial of the agreement, and pleading the statute, would be to cloak or conceal a fraud, by means of a perjury. And if such a proceeding were tolerated, instead of its being "a statute for the prevention of frauds and perjuries," it might not inaptly be termed a statute for the encouragement of frauds by the rewarding of perjuries. But, says the solicitor of the appellees, conceding that cases may be found where a specific performance has been decreed, notwithstanding the denial in the answer, of the parol agreement charged, and of the acts of part performance alleged, and the plea of the statutory bar, yet no case can be found in which relief has been granted, where the point on which he now relies was distinctly presented for the

determination of the court. It may, with equal confidence, be asserted, that no case can be found in which a court of equity refused relief in such a case, sustained by adequate proof, upon the objection being raised which is now relied on. Indeed, notwithstanding the elaborate research made by the solicitor, he has not been able to find a case where, even in the argument of counsel, such a defence has ever been presented to the consideration of a Court of Chancery. The natural inference from which is, that, until the present occasion, it never was deemed by counsel an available defence. The only case which can be regarded as giving even a momentary countenance to such a principle, is that before referred to in 2 *Desau*. 190, where such a question did not necessarily arise, as in the opinion of the court there, the act of part performance charged, in relation to the delivery of possession to the vendee, was unsustained by proof.

This preliminary objection to the powers of the Court of Chancery to grant any relief to the appellants (no matter what may be their proof,) being disposed of, our next inquiry is, are the appellants upon the case, as established by proof, entitled to the relief they have sought? To sustain such title, they must surmount double the difficulties ordinarily encountered by a vendee seeking the specific execution of a parol contract by the vendor, on the ground of part performance. They must not only shew the contract made between *Edward Hall* and *Philip Moore*, and such acts in part performance thereof, as would entitle them to its specific execution, but they must shew themselves entitled to a conveyance from the appellees, *Charlotte* and *Maria Hall*, under the parol gift, alleged to have been made by them to *Edward Hall*. That *Edward Hall*, at the time of his alleged sale to *Philip Moore*, had made no such expenditures or improvements on the lands in controversy, or done any such acts in relation thereto, as would, as far as is disclosed by the testimony, entitle him to a decree for a conveyance from *Charlotte* and *Maria Hall*, is, we think, a proposition too clear to require, in its support, either argument or authority. *Philip Moore*, by his purchase, at the date thereof, acquired in the

lands no greater interest or superior rights than those possessed by *Edward Hall*. The proof in the cause does not shew that *Charlotte* and *Maria Hall* were present at the time of sale, assenting thereto, or that any such assent had been previously given; nor does it shew any such expenditures or improvements on the lands in question as would make it a fraud on the part of *Charlotte* and *Maria Hall* to withhold a conveyance thereof under the alleged parol gift; nor indeed, does the bill filed in this cause charge the making of any such expenditures or improvements.

But suppose it were conceded that the gift made to *Edward C. Hall* was binding on *Charlotte* and *Maria Hall*, and that in virtue of it he could, in a court of equity, have compelled them to convey to him, have the appellants offered that full and satisfactory evidence of the terms of the agreement, and of its performance on their part, as to entitle them to a decree for its specific execution? It must be borne in mind that *Edward C. Hall*, by his answer, denies all the allegations in the bill in relation to the contract, or that any portion of the alleged purchase money was ever paid him by *Philip Moore*. Not a witness in the cause states what, by the terms of agreement, was the amount of purchase money stipulated to be paid. The only two witnesses deposing upon this subject are, first, *William F. Giles*, who said that *Edward C. Hall* stated to him that "*Philip Moore* had paid him four thousand dollars, but deponent cannot recollect, at this time, on what account he stated the said sum of money was paid him by *Mr. Moore*; and he stated in said conversation that *Mr. Moore* did not owe him any thing; since that he had made a verbal claim, and accounted for the inconsistency, by stating that his claim was for the interest due him on some legacy under his father's will."

The second witness is *James C. Gittings*, who states that *Edward Hall* told him "that it was true that he had sold said farm to *Mrs. Moore*, and that he had received from said *Moore*, a part, but not all, of the purchase money." If the testimony of these two witnesses stood unexplained by any other testi-



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mony in relation to the said payment of four thousand dollars, it might well be doubted whether it would be deemed sufficient evidence to over-rule the positive denials in the answer, and to prove payment of the entire purchase money. But when we advert to the fact that no proof has been offered to show that four thousand dollars was, by the alleged agreement, the price at which the land was sold, and that it is undeniably proved, that under the will of *Aquila Hall*, *Philip Moore* was bound to pay *Edward C. Hall* four thousand dollars, the insufficiency of the proof to over-rule the answer is most apparent. Nor does this proof, for such a purpose, derive any aid from the numerous orders, checks and receipts which have been exhibited to establish the payment of four thousand dollars by *Moore* to *Edward C. Hall*. Indeed, they rather disprove, than prove, that such payments were made on account of the purchase money for the land—a portion of them having been made a year or years before the time of the alleged sale to *Moore*, and not a receipt given for any of them, giving the slightest intimation that the payment was made on account of purchase money due for land sold. Having failed to establish the payment of the purchase money for the land alleged to have been sold, the Chancellor could not have done otherwise than refuse to the appellants the relief sought by their bill. His decree is therefore affirmed with costs.

DECREE AFFIRMED WITH COSTS.

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Jones vs. Earle, ex. of Jones.—1843.

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ELIZA JONES vs. RICHARD T. EARLE, EXECUTOR OF ALFRED JONES.—*December 1843.*

In every case where a will is to be construed, the great object is to ascertain, from the face of the paper, the intention and design of the testator, which is to be carried into effect, unless opposed by some principle of positive law. The will and the codicil constitute one instrument; and the codicil revoking in terms a portion of the will, has the effect to republish the will as of the date of the codicil, in respect to all parts of the will not revoked by the codicil, either in express terms, or by a bequest or devise, so entirely inconsistent with the terms of the will as to make it impossible to give effect to both.

A testator devised his slaves, in trust, to be manumitted as they severally arrived at the age of forty years, or immediately upon his real estate devolving on his grand nephew, should it come to his hands; and, *in trust also for the term they have to serve*, for the use of his wife and any child he may have by her, for and during the term of her natural life, and after her death for the use of any child that may survive her. By a codicil he revoked "that part of my will which manumitted my servants as they severally arrived at the age of forty years, and devised them to his wife, for and during her natural life, and *after her death* then said servants to be free; but in case that any of said servants shall runaway, and afterwards be apprehended, they shall forfeit their freedom and be sold for life." After the testator's death some of the servants ran away, and were sold by the widow as slaves for life. The trustees under the will claimed the proceeds for the purpose of investment, and brought an action at law, (in which all errors of pleading were waived,) to recover them. **HELD:** that the widow was entitled to the fund absolutely.

It is only where, by gratifying a particular intent as to a part of a will, a more general and more important disposition of other parts of it are defeated, that the particular or minor intent must yield. Where both may be gratified there is no conflict, and consequently no necessity to yield either.

A bequest of freedom to slaves, as they arrived at a particular age, is not a legacy to them; nor, when it is granted upon condition of good behavior, will its forfeiture create a lapse, though the bequest of freedom is defeated, the right of the slave after forfeiture, nor to his proceeds after a sale, not being expressly bequeathed to any person.

Where there is a bequest of slaves for life, and of freedom after the death of the tenant for life, a clause in the will declaring forfeiture of freedom in case of running away and a sale for life upon their apprehension, is designed for the benefit of the tenant for life, to secure the good conduct of the slaves, and the proceeds of any such slave sold for absconding, in the absence of any provision to the contrary by the testator, will belong to the legatee for life.

APPEAL from *Baltimore County Court.*

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Jones vs. Earle, ex. of Jones.—1843.

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This was an action of *Assumpsit*, commenced by consent of parties, under the following agreement:

It is hereby agreed, that all errors in pleadings be waived, and that the paper marked "Plaintiff's exhibit A," herewith annexed, is a true copy of the last will and testament of *Alfred Jones*, deceased, as well as of the codicil thereto annexed; that after the execution of the said will and codicil, the said *A. J.* departed this life, and that after his death, the said last will and codicil were duly proved and recorded; that after the same was proved and recorded, the said *Richard T. Earle* alone took out letters testamentary on the estate of said *A. J.*, and that after he the said *R. T. E.* became executor as aforesaid, he the said *R. T. E.*, with the consent of the said *Eliza Jones*, disposed of, and converted into money, all the cattle, sheep and hogs of the said *A. J.*, on his farm at the time of his death, and all the farming utensils, and a part of the household furniture of the said *A. J.*, and that the said *R. T. E.*, as sole trustee under the will, with the consent of the said *E. J.*, invested the said money in bank stock, under a decree of the Court of Chancery, affirmed by the Court of Appeals, for the benefit of the said *E. J.*, during her life, and for the benefit, after her decease, of *Arthur T. Jones*, who is named in said will. It is also admitted, that the said *R. T. E.*, as sole executor of the said *A. J.*, has paid all the debts and legacies of the said *A. J.*, and passed a final account, as executor as aforesaid, and hath delivered over to the said *Eliza Jones*, all the property, including the negroes, (except the negroes who had absconded at the time of said *A. J.*'s death,) to be held by the said *E. J.*, during her natural life, and that the said *R. T. E.* has invested the stocks held by the said *A. J.*, at the time of his death, for the benefit of the said *E. J.*, during her natural life, and has paid the dividends thereof, which have hitherto accrued, as well as the dividends that have accrued on the stocks invested under the sanction of the Court of Chancery, to the said *E. J.* And it is further admitted, that since the said negroes have been delivered over to the said *E. J.*, one of them named *Jeff*, and another of them named *Peggy*,



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did run away, and were subsequently apprehended, and sold as slaves for life, to purchasers out of the State, by the said *E. J.*, and that the said *E. J.* received the purchase money for the negroes so sold as aforesaid, and has ever since held the same; that the said sales were made without the consent of the said *R. T. E.*; that negro *Jeff* ran away about the 6th of August 1836, and was apprehended and sold by the said *E. J.* about the 20th of August 1836, for the sum of \$800, and that the expenses of apprehending the said negro *Jeff*, amounted to \$50, which expense was paid by the said *E. J.*; that about the 25th of March 1841, negro *Peggy* ran away, and that she was apprehended and sold about the 30th March 1841, for the sum of \$575, and that the expenses of apprehending her amounted to seven dollars, which amount was paid by the said *E. J.* It is further admitted, that the said *R. T. E.*, as executor as aforesaid, had no knowledge of the said sales, at the time that they were made, and never consented thereto, and that since the said sales, and before the bringing of this suit, he demanded from the said *E. J.* the proceeds of the said sales, for the purpose of investing the same for the use of the said *E. J.*, during her life, and after her death, for the benefit of *Arthur T. Jones*, the residuary legatee in the will of the said *Alfred Jones*, but that the said *Eliza Jones* refused to pay over the said proceeds, and claimed the said slaves as having been forfeited to her. It is further agreed, that no objection is to be made to the form of this action. It is further admitted, that *R. T. E.* is the only trustee named in the will of *Alfred Jones*, who has accepted the trust; that the case be docketed to May term 1842 of *Baltimore* county court; that the nar, plea and foregoing statement of facts and argument, be filed, and that judgment *pro forma* be entered by *Baltimore* county court, for damages in nar, to be released on payment of \$1,318, and costs, and that the defendant may appeal to the June term of Court of Appeals, without giving security.

The will of *Alfred Jones*, referred to in the statement, after disposing of his real estate, proceeded as follows:

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“I give and bequeath unto my said friends, (*R. T. E.* and others,) their executors, administrators and assigns, *all my personal estate*, of every description: *In trust*, nevertheless, to *manumit all my slaves as they severally arrive to the age of forty years*, the said forty years of age to be determined by an entry in the last part of my oldest day-book, where I have made a list of their names and respective ages; and to manumit all my said slaves, immediately upon my real estate devolving on my said grand nephew, *Arthur T. Jones*, should it come to his hands; and *in trust also*, to hold my said estate, including my said slaves, for the time they have to serve, for the use of my said dear wife *Eliza Jones*, and any child or children I may have by her, for and during the term of her natural life, and after her death, for the use of my child or children that may survive her, their executors, administrators and assigns, for ever. If my said wife should have no child or children by me at her decease, or if my surviving child or children should die without lawful issue of their bodies, before they arrive at the age of twenty-one years, then, in trust, to hold my said personal estate, *except my slaves*, for the use of my grand nephew, *A. T. J.* aforesaid, his executors, &c., for ever.” There were other devises over of the testator’s personal estate *except his slaves*. The testator also made provision for the support of some of his *aged slaves*, then unable to labor. This will was dated on the 16th August 1830.

On the 15th February 1831, the testator added the following codicil to his will:

“I hereby revoke and make void that part of my will which manumitted my servants, as they severally arrive at the age of forty years, and do now give and devise all my said servants (except old *Harry*,) to my dear wife, for and during her natural life, and after her death, *then said servants to be free*; but in case that any of said servants *shall run away, and afterwards be apprehended*, they shall forfeit their freedom, and be sold for life. I do hereby give and devise to my dear wife the sum of one thousand dollars, to dispose of as she may think proper. If any of my servants, which I have at this time run

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away, shall be apprehended *after* my death, I do hereby direct *that they shall be sold for life.*"

Upon this agreement, *Baltimore* county court rendered judgment for the plaintiff, and the defendant prosecuted this appeal.

At the argument here, the parties made further admissions, as follows:

It is admitted that *Alfred Jones* died, having had no child, nor descendant of a child, but leaving a brother at the time of his death, and that since the bringing of this suit, *Eliza Jones*, the appellant, has died, and that in deciding this case, the decision is to be the same as it would have been, if the suit had been brought after the death of *Eliza Jones*, against her administrator, except, that if the court should be of the opinion that no suit could properly be brought until after the death of *Eliza Jones*. Costs are to be allowed the appellant.

It is also agreed, that the record shall be amended, by inserting in lieu of the following agreement of counsel, (*ante*), to wit:

It is agreed that the case be docketed to May term 1842 of *Baltimore* county court, &c., down to the words, "without giving security;" and signed by, &c. The following agreement, to wit:

It is agreed that this case be docketed to May term 1842 of *Baltimore* county court; that the nar, plea and foregoing statement of facts be filed and submitted to *Baltimore* county court, for their judgment; and it is agreed, that if said *Baltimore* county court shall be of opinion, on the foregoing statement of facts, that the plaintiff is entitled to recover, then said court shall give judgment for the plaintiff, on said case stated, for the damages in the declaration, to be released on payment of the sum of \$1,318, and costs; and if they shall be of opinion, that on said statement of facts the plaintiff is not entitled to recover, then judgment is to be entered for the defendant for costs. And it is also agreed, that from the judgment of said court either party may appeal.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS and SPENCE, J.



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*Jones vs. Earle, ex. of Jones.—1843.*

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By G. R. RICHARDSON, D. A. G., and REVERDY JOHNSON  
for the appellant, and

By G. M. GILL and McMAHON for the appellees.

CHAMBERS, J., delivered the opinion of this court.

In this, as in every other case in which a will is to be construed, the great object is to ascertain, from the face of the paper, the intention and design of the testator; which is to be carried into effect, unless opposed by some principle of positive law. The will and the codicil constitute one instrument; and the codicil revoking, in terms, a portion of the will, has the effect to republish the will as of the date of the codicil, in respect to all parts of the will not revoked by the codicil either in express terms or by a bequest or devise so entirely inconsistent with the terms of the will, as to make it impossible to give effect to both.

The terms of this will are plain and perspicuous. In the contingency which occurred, and was apparently anticipated by the testator, that is to say, the survivorship of his wife, without children, she would have taken an interest in all his negroes during her life, or until they should severally arrive to the age of forty years, at which age they were to be successively manumitted by the trustees. The will made no provision in regard to such as should abscond from service, nor any distinction between such as should be faithful and such as should be disobedient.

The existing provisions of our laws, however, have made some distinctions on the subject. If any one of these negroes had absconded from the service of the legatee, the courts, on her application, would have extended the term of service of such negro beyond the age limited by the will for a period sufficient to reimburse to her the loss of his service, and all cost and expense in re-taking him. That additional service would have enured exclusively to her advantage.

The codicil indicates that the testator was not content with this sanction for the fidelity of the negroes, and its main design seems to be to secure their services to his wife for her

life, and then to have them liberated. The codicil is obviously written with less professional skill, but we think it developes the intent of its execution. It revokes in explicit terms that portion of the will "which manumitted his servants as they severally arrive at the age of forty;" and this manifestly because it opposed his wish, which he, in the same sentence, proceeded to declare, by adding that he "does now give and devise all his said servants to his wife, for and during her natural life, and after her death then said servants to be free." The will carefully excepts the negroes from the other property whenever it is spoken of as passing beyond his wife and children, if any. All the interest in the negroes which is bequeathed at all is, by the will, given to the wife and children, and by the codicil to the wife alone, and in every instance where other legatees are necessarily named they are expressly excepted as not to be included in the bequest. With the evidence furnished by these facts it would seem difficult to suppose the clause in the codicil, for the punishment of fugitive servants, designed for the benefit of those other legatees. It is however contended that a more general intent of the testator will be defeated by any other interpretation. But we do not perceive that the least violence is done to any such general intent. If indeed there be assumed a general intent to give *all* the property after his wife's death to the other legatees, that would be defeated; but this is assuming the precise matter of controversy. We regard the leading intent of the instrument to be, that his wife should enjoy all his estate for her life, and that after her death the other legatees should enjoy it all except the negroes, and this will not be deranged or defeated with regard to any thing else except the particular specific article of property which is to be disposed of according to specific directions. It is no objection to a bequest or disposition of one item of property, that the testator designed all the rest of his estate to go in a different direction. It is only where, by gratifying a particular intent as to the part, you defeat a more general and more important disposition of other parts, that the particular or minor intent must yield. Where both

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may be gratified there is no conflict, and consequently no necessity to yield either.

Various parts of the will, we think, indicate a particular intent to confine to *Mrs. Jones* the whole benefit which, by the will, is disposed of, either for the services of the negroes or the proceeds of their sale. By giving effect to this intent we do not disturb any purpose of the will to give to the wife a life estate in every thing else than the fugitive slaves, and to the other legatees the whole personal estate bequeathed to them after the wife's death.

It has been strongly urged that the bequest in relation to the negroes is to be regarded as a legacy, and that the forfeiture of freedom and sale defeats its operation and causes it to lapse and fall into the residuum of the estate, and then pass, with other property, to the trustees.

We cannot so regard it. The idea of a lapsed legacy can only be connected with some thing or object which, failing by some cause to reach the legatee, is received by some other person, generally the residuary legatee, if there be one. What is the object or thing in this case? Not the freedom of the servants, because that cannot pass to a residuary legatee; nor the services of the servants, because they were never bequeathed to a specific legatee who is not capable of taking. The fugitive negro was to be sold, and the immediate contest is, to whom the proceeds belong. If these proceeds can be regarded as a lapsed legacy it must be in consequence of the failure of a previous bequest of them. But that previous bequest is the precise matter of inquiry, and if ascertained, determines the difficulty, not by reason of its being a case of lapsed legacy, but because, finding the first legatee, we find one capable of taking. Again, we cannot regard the residuary clause relied on as capable of passing any interest in these fugitive slaves, even if it could be considered as a case of lapse legacy, inasmuch as the will has so carefully and repeatedly excluded the negroes from the residuum, which he designed to pass to his collateral relations, by saying, in so many words, in not less than four different instances, when referring to his personal estate, "except my slaves."



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Darrington vs. Rogers.—1483.

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Being of opinion, for these reasons, that the whole interest in the negroes sold was given to the appellant, it is quite unnecessary to examine the various other points raised in the argument. Let the judgment be reversed, and judgment be entered for appellant for costs.

JUDGMENT REVERSED.

ARCHER, J., dissented.

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MARY A. DARRINGTON AND OTHERS vs. WILLIAM ROGERS  
AND OTHERS.—*December, 1843.*

The election of a widow to stand upon her legal rights, though it occasion loss to devisees under her husband's will, is still a loss resulting by operation of law, and against which the testator only could have provided an indemnity.

By the election of a widow to renounce her husband's will, all devises and bequests made to her are inoperative and void; and the property given to her, except so far as it may be diminished by the exertion of her legal rights, remains as if no such devises to her had been made.

Apart from the act of 1810, concerning lapsed legacies and devises, it stands precisely in the condition in which it would have stood had the wife died in the life-time of the testator.

Where the testator directed the sale of all his real and personal estate, and disposed of the proceeds of sale, and all the residue and remainder of his estate generally, the one moiety to trustees for the benefit of his wife and children in the manner specified in his will, and the other moiety to trustees for the benefit of the complainants, if, from any cause, the legacy to the wife lapsed, it could not sink into the general residue.

Where a testator divided the residue of his estate into moieties, and devised them to two distinct classes of devisees, one of them his children and heirs-at-law, the other collateral relations, but directed that his widow should have a portion of the moiety given to the children in lieu of dower, and she renounced the will, her portion will be deducted from the moiety given to the collateral relations, as the legacy to her, in consequence of her renunciation, becomes a residuum unaffected by any testamentary disposition, and as such vests in the testator's heirs or next of kin.

By the act of 1830, ch. 185, it was declared that no appeal shall hereafter be allowed from any decree or order of the Court of Chancery, unless it be a final decree or order in the nature of a final decree. **HELD:** that an appeal from an order referring a cause to the Auditor, for an account, with directions as to the mode of stating it, was not authorised under that act.

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Darrington vs. Rogers.—1843.

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## APPEAL from the Court of Chancery.

On the 11th October, 1841, the appellants filed their bill, alleging that they were legatees mentioned in the last will of *Zachariah Woollen*, who died in August, 1837; that by its provisions the real estate of the deceased is directed to be sold by his executors, and after payment of his debts, one half of the net proceeds are directed to be invested or lent out on mortgage, or on security, &c., and the rents and profits, &c., arising therefrom to be applied for the separate use and sole benefit of the complainants; that *Rebecca Woollen*, widow of the testator, *Williams Rogers* and *James Tracey*, were constituted executors by the will; that *J. T.* renounced his appointment; that letters testamentary were granted to the other two; and that *Rebecca* has since married with *Edward S. Myers*. The bill then alleged that the executors had settled several accounts, some of which were intended to be contested; that complainants had received less than half the interest due them in four years, since the death of the testator; that the complainants are informed and believe that the executrix and executor, (which last is also trustee,) insist that the complainants are not entitled to the use and benefit of one equal moiety, or half part of the said estate, but that they are entitled to one-half after deducting a proportion of the said *Rebecca*, as widow, she having refused to abide by the will; renouncing the provisions in her favor, and relying on the provisions of law in her behalf, against which construction of the will these complainants protest; that the testator at his death left three children, all of whom still survive and are infants of tender years; that the trustees under the will have failed to invest one-half of the net proceeds of the estate for the use and benefit of complainants. Prayer for relief according to the will, sale and investment, subpoena, &c.

The testator by his last will devised as follows: "Item: I hereby direct my executrix and executors, hereafter named, or the survivors, or acting ones of them, to sell and dispose of, at, &c., to the best advantage, all my real, leasehold and personal estate, except my household and kitchen furniture; and

upon receipt of the purchase money therefor, make, execute, &c., to the purchaser, one or more good and sufficient deed or deeds of conveyance for the same, the proceeds arising from which sale, with all the residue and remainder of my estate, generally, I devise and dispose of in manner following, that is to say :

*First.* One moiety, in which is to be included all my household and kitchen furniture, I devise and bequeath unto my friends *William Rogers* and *James Tracy*, and the survivors, and survivor of them, and their, &c., in trust ; nevertheless, that the same shall be held and invested by the said trustees, or, &c. in some productive stock, &c., or placed out at interest, on, &c. ; and the investments from time to time to change, &c. ; and that my beloved wife, *Rebecca Woollen*, during her widowhood, be permitted to have, receive, and apply the dividends, rents, profits, interest and income, arising therefrom, to the support of herself, and to the support and education of our dear children, during their minority ; and from and immediately after the intermarriage of my said wife with any other person, then in trust, that the one-third of the principal of the said moiety, or half part of my estate, shall become the property of and be forthwith conveyed, assigned and transferred to my said wife, *Rebecca*, her, &c., absolutely ; and the remaining two-thirds thereof shall become the property of and be equally divided between the children I now have, or the child or children I may hereafter have, their heirs, &c., absolutely, as tenants in common, share and share alike ; but in case my said wife shall *not* intermarry with any other person, then immediately after her decease, the principal of said entire moiety or half part of my estate, shall become the property of and be equally divided between the children I now have, and the child or children I may hereafter have, their heirs, &c., absolutely, as tenants in common, share and share alike, the issue of any deceased child, if any such issue there should be, either in the division of the two-thirds or of the whole of said moiety, to have and take the part or share only to which the parent of such issues would, if living, be entitled. And in the event of the decease of any



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of my children, under age and without issue, the part or share of him, her or them, so dying, shall descend to the survivors or survivor of them.

*Secondly.* And the remaining or equal half part of my estate I devise unto my said friends *William Rogers* and *James Tracy*, and the survivors, &c., in special trust, that the same shall be held and invested by the same trustee, &c., in some productive stock, &c., or placed out at interest on good mortgage, &c., and the investments from time to time, to change, &c., *for the period of five years from the time of my decease*, and that during that period my sister, *Mary Ann Darrington*, and her children, *Mary Ann Craig*, &c., be permitted and suffered in equal proportions, to take, receive, and have applied, for their separate use and sole benefit, the dividends, rents, &c., arising therefrom, without being subject to the control of their respective husbands, or bound for the fulfilment of their contracts. And at the expiration of said five years, then in trust, that *one equal thirteenth* part of the principal of said moiety shall be conveyed, &c., and paid over. And I do hereby devise the same unto my said sister *Mary Ann Darrington*, her, &c., absolutely, one other equal part of the principal of said moiety shall be conveyed, &c. And I do hereby devise the same unto my said nephew *William Lovell*, his, &c., absolutely. And in trust as to the remaining *eleven-thirteenths* thereof, that each one of my other nephews above named, until they severally attain the age of twenty-five years; and each one of my nieces above named, during their respective natural lives, be permitted and suffered to take, &c., to their sole and separate use and benefit, respectively, one-eleventh part of the dividends, rents, &c., arising therefrom, without, so far as it relates to the portions of all my nieces above named, being subject to the power, &c. And in trust, as my nephews, hereinbefore named, severally attain to the age of twenty-five years, that one-eleventh of the principal estate shall then be conveyed, assigned, transferred and paid over. And I do hereby devise such one-eleventh to each of them respectively, their heirs, executors administrators and assigns,

absolutely. And in further trust, that my nieces hereinbefore named, respectively may, and I do hereby fully authorise and empower them, respectively, by any instrument of writing, in the nature of, or purporting to be, her last will, &c., to devise and dispose of one-eleventh of the principal estate to such person or persons, or for such uses and purposes as my said nieces respectively shall think proper and direct; and in case any of them shall neglect or omit to make such devise, bequest or disposition of such one-eleventh, then in trust, that such one-eleventh shall descend to, and become the property of. And I do hereby devise and bequeath the same unto the child or children of my nieces respectively, who shall so omit or neglect to make disposition thereof, as before authorised, and to the heirs, &c.; if more than one, to be equally divided between them, as tenants in common, share and share alike. But in case any of my nieces, so omitting to make a will and testament, shall depart this life, without leaving a child or children, or descendants of the same, living, then in trust, that the one-eleventh of the principal estate of my niece or nieces, so dying, &c., shall descend to, and become the property of; and I do hereby bequeath the same, absolutely, unto the right heirs of such niece or nieces, respectively. And in case any of my nephews or nieces, hereinbefore named, shall depart this life, under lawful age, and without issue, the part and share of my estate, devised to or for the benefit of him, her or them, so dying, shall descend to the survivors or survivor of them.

*Lastly.* I do hereby nominate and appoint my said beloved wife, *Rebecca Woollen*, and my friends, *William Rogers* and *James Tracy*, to be executrix and executors of this my last will and testament. And I also appoint the two last above persons to be guardians of my children, hereby revoking all former wills by me made, and declaring this to be my last and only one.

With this will were also filed—

The renunciation of *James Tracy* as executor and trustee.

The renunciation and election of *Rebecca Woollen* as widow.

Various accounts of the administration of *Z. W's.* estate.

After the answers of the several defendants were filed, at March term 1842, the Chancellor (BLAND,) passed an order, directing a sale of Z. W's. real estate, and appointed a trustee for that purpose as usual; and after notice to creditors to file their claims, he further ordered, that the said executors, the defendants, *William Rogers*, and *Edward S. Myers* and *Rebecca*, his wife, account with the other parties to this suit, of and concerning the personal estate of the said *Zachariah Woollen*, deceased, which may have come to their hands, or been distributed by them, or otherwise. And this case is hereby referred to the auditor, with directions to state such account accordingly, from the pleadings and proofs now in the case, and such other proofs as may be laid before him, in which he will distribute the said personal estate of the deceased, so far as it will go; in the first instance, among his creditors in satisfaction of their claims, and then the proceeds of the sale of the said real estate in discharge of so much of the said claims as may have been so left unsatisfied from the personal estate. And then, considering the will of *Zachariah Woollen*, deceased, as operating only upon so much of his estate as he might thus lawfully dispose of, the auditor will award to the said *Rebecca Myers*, as the widow of the said deceased, her legal distributive share of the surplus, if any, of the said personal estate, together with the value of her dower, out of the whole net amount of the proceeds of the sale of the said real estate, to be ascertained according to the rule of the court, and then the auditor will distribute the residue of the proceeds of the sale of real estate, together with the residue of the surplus, if any, of the personal estate; first, dividing the same into equal moieties, as directed by the last will and testament of the said *Zachariah Woollen*, deceased; and the parties are hereby authorised to take testimony in relation to the said accounts and statements, before any justice of the peace, on giving three days notice, as usual; provided, that the said testimony be taken and filed in the chancery office, in this case, on or before the expiration of the time allowed to creditors to file the vouchers of their claims as aforesaid.



From this decree, the complainants, who were entitled to the moiety, secondly devised by the said Z. W., appealed to this court, having filed in the Court of Chancery the following agreement:

It is understood, and hereby declared, that the complainants, in appealing from the decree of his Honor the Chancellor in the above case, do not mean thereby to delay or interfere with the execution of the duties of the trustee, nor with the adjustment of the accounts of the executors of *Zachariah Woollen* with said complainants, nor with any of the other directions of said decree, *than that which allows and awards to said complainants one-half of two-thirds only of the net proceeds and balance of the real and personal estates of said Zachariah Woollen*; the said complainants claiming and protesting that they are entitled to one-half of the whole of said net proceeds and balance, and this they design to urge on said appeal.

The cause was argued before STEPHEN, DORSEY, CHAMBERS and SPENCE, J.

By N. WILLIAMS and W. SCHLEY for the appellants, and  
By W. F. FRICK for the appellees.

DORSEY, J., delivered the opinion of this court.

The testator having directed the sale of all his real and personal estate, without any preceding devises or bequests, declares that he gives and disposes of the proceeds of sale, "and all the residue and remainder" of his "estate generally," the one moiety or half part thereof, to trustees, for the benefit of his wife and children in the manner specified in his will, and the remaining moiety or half part, to trustees, for the benefit of the complainants. The testator thus divided his estate into two separate and distinct moieties; giving each moiety to different persons; and by nothing that appears in the will, can we even raise an inference, that upon any contingency or condition that might happen, the whole or any portions of those distinct moieties were ever again to commingle; or that the legatees, entitled to one moiety, should ever become entitled

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to any portion of the other. In the contemplation of the testator, as far as we can collect it from the face of the will, the moiety was intended to be as completely separated and as permanently distinct from each other, as if they had never formed one common fund or residue and remainder. It is true that the testator had made bequests, to his wife, out of one of those moieties, which he thought would have been a sufficient temptation to have prevented her from asserting her legal rights to his estate. But for the event of her doing so, he has provided no change or substitution in the testamentary disposition of his property. And he having failed to do it, we cannot do it for him; the more especially as it would, *pro tanto*, work the disinheritance of his children and heirs at law. The election of the widow, to stand upon her legal rights, does, it is true, occasion loss to the appellants; but it is a loss resulting by operation of law, and against which the testator only could have provided an indemnity. The condition of the children, too, was changed by the election of their mother: they might also have sustained loss, by receiving less than their father had given, and by his will designed to have given them. Suppose the widow had died immediately after having made her election, what would have passed to the children under their father's will? Two-thirds of a moiety of his personal estate, and a moiety of the real estate, subject to a dower. But suppose she had died, about the same time, without any renunciation of the bequests made to her by the will, what then would the children have received? By the express terms of the devise to them, an entire moiety of their father's estate, both real and personal.

Upon the election of the widow, all devises and bequests made to her by the will were inoperative and void; and the property given to her, except so far as it may be diminished by the exertion of her legal rights, remains as if no such devises and bequests had ever been made to her. Apart from the act of 1810, concerning lapsed legacies and devises, it would stand precisely in the condition in which it would have stood had the wife died in the life-time of the testator. In

such a condition of things, would not the limited temporary interest of the wife (under the will) in the moiety, have sunk and passed, under the limitation, over to the children in perpetuity? By the marriage of the wife subsequent to her renunciation of her husband's will, no change is wrought in her rights or the rights of other persons in the estate of the testator. The rights of all parties remain the same that they were when the renunciation was made, and that they would have been, had no such provision, in relation to the second marriage, been contained in the will. But should we regard this contingent legacy to the wife, after her election, as so far continuing to operate, as upon the happening of the contingency, to become a lapsed legacy, it could not sink into that general residue and remainder, which, by the express direction of the testator and in legal contemplation, had antecedently been divided, and of one of which divisions it formed a part. Under the devises and bequest to the complainants, we think it manifest, that no part of it passed. See the cases of *Wisner vs. Barnet and al*, 4 Wash. C. C. R. 631. *Cruse vs. Barley*, 3 P. Wms. 20. *Davers vs. Dewes*, 3 P. Wms. 40; and *Collins vs. Wakeman*, 2 Ves. jr. 683.

But suppose we are wrong in the construction we have given to the will, under the contingencies that have occurred, in regarding the entire moiety as passing to the children under the devise in their favor, subject only to the rights of the widow, in virtue of her election. The legacy to the widow, in virtue of her renunciation, having lapsed or become void, and failing to pass under any of the devises or bequests in the will, becomes a residuum of the testator's estate, unaffected by any testamentary disposition, and as such, vests not in the complainants, but in his children, as heirs and next of kin.

This case has been brought up to this court by appeal, contrary to the provisions of the act of 1830, ch. 185, and must therefore be dismissed. In venturing, under such circumstances, at the earnest solicitation of the solicitors of both parties, to express our opinion upon the merits of the present controversy, we wish it to be distinctly understood, that this act of



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the court is not to be regarded as a precedent to be followed in any future similar appeal. There is already more business, legitimately before us, than can be definitively disposed of before we shall be called on to attend the courts in our districts; it cannot therefore be reasonably expected, that we should suffer our time to be consumed in the argument of cases, for the decision of which, we have no jurisdiction.

APPEAL DISMISSED.

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WILLIAM J. COLE vs. ANTHONY ALBERS AND THEODORE RUNGE.—*December 1843.*

To vacate a deed by the insolvent laws existing anterior to the act of 1834, ch. 283, the grantors, at the time of executing the deed, must have contemplated taking the benefit of the insolvent laws; otherwise, the deed could not therefore be condemned as made with a view or under an expectation of being and becoming an insolvent debtor, and with intent thereby of giving an undue and improper preference.

A deed made at the request of the creditor, prior to the act of 1834, was not within the meaning of our insolvent laws.

The act of 1834, ch. 293, so far it authorises the courts to vacate conveyances made in contemplation of insolvency, is a local law confined to the city and county of *Baltimore*, and does not apply to cases where the grantee had not notice of the insolvent condition of the grantor.

Where, after the execution of a deed of mortgage, the mortgagor lent money and sold goods to the mortgagee, and took notes for the payment of his debt, in semi-monthly instalments, this is evidence that he did not know his debtor to be in an insolvent condition.

The notice required by the act of 1834, to vitiate a conveyance is not a technical or constructive notice, but an actual notice derived from a knowledge of the condition of the grantor of such conveyance.

At common law a debtor has a right to prefer one creditor to another, and, independent of our statute in relation to insolvent debtors, may give such preference.

Evidence cannot be admitted which would have the effect of changing the character and legal operation of a deed.

When a deed purports to have been made on a monied consideration, it cannot be shown that money did not constitute the consideration; where a deed is impeached for fraud, and the consideration stated is money, it will not be allowed to set up a different consideration as marriage to support the deed.

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Where the consideration stated in a mortgage is a sum of money in hand paid, and it is taken to secure that sum, evidence is admissible to show a part of the sum paid, and that it was to secure advances made, and to be made, to that extent. Such evidence would not affect the nature of the deed. It would still be founded on a money consideration.

Such evidence is also admissible to rebut the idea of fraud, by showing the same kind of consideration, differing only in amount, and the circumstances under which it assumed this shape.

The design of the act of 1825, ch. 50, was to prevent liens on property to the prejudice of creditors, for amounts and claims never contemplated by the parties at the time of the execution of their mortgage, of which the mortgage, by its terms, gave no notice.

A deed executed to cover a mortgage against all future liabilities of any and every description, which the mortgagor might incur or be responsible for to the mortgagee, would be within its provisions.

#### APPEAL from the Court of Chancery.

The bill in this cause was filed on the 11th February, 1841, by *William J. Cole*, and alleged that before the 1st September, 1839, *Charles Brecht*, of the city of *Baltimore*, merchant, was indebted unto *Albers and Runge*, of *Baltimore*, as copartners, and various other persons in said city, in large sums of money, was actually insolvent; and which insolvency was known to said *Albers & Runge*; that on the day above mentioned *C. B.* formed a copartnership with one *Frederick Uthoff*, also of said city, and that the said *C. B.* then had a stock of goods of some value, which passed to himself and the said copartner, and that the said partnership took upon themselves the debts of the said *C. B.*; that at the time said partnership was formed the said *F. U.* had a capital of \$3,240, the whole of which was paid to *Albers & Co.* on account of their said claim against *C. B.*, whereby the claim of *A. & Co.* against *C. B.* was reduced to \$1,286.62, and the new firm of *B. & U.* was rendered actually insolvent when they commenced business, but which was kept secret from the then creditors of the said *C. B. & Co.*; that on the 2nd December, 1839, *C. B. & Co.*, then being actually indebted to *A. & Co.* in the sum of \$4,753.08, including the above balance of \$1,286.62, and no more, and being then actually insolvent, and intending to give the said *Albers & Co.* an undue, illegal and improper preference, and in fraud

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of the rest of their creditors made to the said *A. & Co.* a bill of sale for all the goods, merchandise and furniture then remaining, standing and being in the store No. 95, in *Baltimore* street, and then in occupation of the said *B. & U.*, as is therein specified, and also of all the outstanding promissory notes and other evidences of debt belonging to them, or either of them, and all future proceeds and avails arising from sales of the goods of said store, for the professed consideration of the sum of \$10,000 in hand paid, when, in truth and in fact, no such sum of money, nor any part thereof, was paid, and there was not any other consideration than the above mentioned balances of account, and that the said pretended consideration was inserted further to deceive and defraud their creditors, and to give to the said *A. & Co.*, an undue, illegal and improper preference. The said bill further alleged that on the 1st September, 1840, or about that time, the said *F. U.* and the said *T. R.*, (their respective partners *C. B.* and *A. A.*, then being in *Europe*, where the said *A. A.* now resides,) contriving and intending how further to injure and defraud the creditors of *C. B. & Co.*, agreed together that the said *T. R.*, by virtue of the bill of sale herein before mentioned, should take possession of and sell and dispose of the goods, &c. of *C. B. & Co.* to a very large amount, and in fact of nearly the whole thereof, for the purpose of paying the said balance so due as aforesaid; and that about that time the said *F. U.* actually delivered to the said *T. R.* goods, &c. to the value, as per invoice, of \$7,959.97; that the greater part of the said goods so delivered by the said *F. U.* to the said *T. R.* were not in fact included in the said bill of sale; that the said *F. U.* also delivered to the said *T. R.* divers promissory notes, of persons names unknown, and that on the 17th September, 1840, the said *F. U.*, and on the 6th October, 1840, the said *C. B.*, applied for relief under the insolvent laws of *Maryland*, and that on the 8th of January, 1841, the complainant was appointed trustee for the benefit of their creditors, and gave approved bond, with security, as such; that complainant being advised that the payment of the said sum of \$3,240, by *B. & U.* to *A. & R.*, and the execution of the said bill of sale



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and delivery of goods, &c., was illegal, fraudulent and void, after his appointment as aforesaid, made application to the said *T. R.* to pay to him, as trustee as aforesaid, the said sum, &c., and deliver up, &c., in order that he might make distribution among the creditors of the said *B. & U.*, but that the said *T. R.*, contriving and intending how further to injure and defraud the complainant and the creditors of the said *B. & U.*, pretends that the said sum of \$3,240 was rightly paid by *B. & U.*, and that the bill of sale, &c. rightly made and delivered to *A. & R.*, and refuses to pay, &c. Prayer for subpœna; answer to bill and various specific interrogatories; for an account; that the bill of sale may be declared fraudulent and void; that *A. & R.* may be decreed to pay and deliver up the money, property and effects in their hands of the said insolvents; that their claim as creditors may be forfeited for their collusion with the said *B. & U.* to obtain an undue preference, &c.

The answer of *Albers & Runge* alleged that prior to the 7th August, 1837, *C. B.* was a partner of the firm of *Rhodes, Eicke & Co.*, which carried on business in *Baltimore*, till that day, when it was dissolved, and *B.* then commenced and carried on business on his own account in said city. The business in which the said *B.* was almost exclusively engaged was selling by retail silk piece goods, of which the defendants were importers; that *B.* applied to the said *A.* to send to *Europe* large orders for silk piece goods, to be imported by him, and to be settled for on their arrival, either by the payment of their cost in cash or in some other satisfactory way, an engagement frequently made by those in the retail trade with importing merchants who enjoy a credit abroad; that *B.* also applied to *A.* to sell him goods on credit, and to lend him money when he stood in need of it, all of which said *A.* was perfectly willing to do for the assistance and accommodation of the said *B.*, if he could be made safe in so doing, and it was accordingly agreed between them that the said *A.* would accommodate the said *B.* in the way he wished, provided said *B.* would secure him by executing a mortgage or bill of sale on his stock of

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goods, outstanding debts, furniture, &c., and with the understanding that the sum of money to be advanced, including goods sold to *Brecht*, was at no time to exceed the sum of \$10,000; and in the month of August, 1837, the said *B. & A.* applied to a magistrate to prepare a bill of sale. In conformity with the above agreement said bill of sale was drawn up, and executed on the 16th August, 1837, and recorded; and said bill of sale appears on its face to have been made for the consideration of \$10,000, paid by said *A.* to *B.*, but there was at the time when it bears date only the sum of \$716 $\frac{5}{8}$  actually due from *B.* to *A.*; said *Albers* had, however, at that time sent out orders for goods for account of *B.* to the amount of \$3,563, which arrived early in the month of October following, and were then delivered to said *B.* without further security than said bill of sale. It was the intention of said bill of sale, and was expressly so agreed upon between the parties thereto, that it should stand as a security for the sum then due, as well as for all subsequent debts which might become due from said *B.* to said *A.* to an amount not exceeding \$10,000 at any one time. From that time said *A.*, relying upon the security afforded by said bill of sale, gave extensive credits to said *B.*, both by selling him goods and loaning him money; that on the 1st January, 1838, said *A.* took *T. R.*, who had been his clerk since 1st January, 1836, into partnership with him, and soon after said *A.* sailed for *Europe*, where he has ever since remained; that early in the year 1839, *B.* proposed to take *U.* into partnership with him, who was his clerk and bookkeeper, provided he *U.* would put into the concern a capital of \$3,000; said *U.* assented and succeeded in obtaining said amount, as these defendants have been informed and believe, from his father, who deposited four thousand Rex dollars to the credit of said *U.* with a house in *Bremen*; at the request of said *U.* these defendants drew a bill for that amount, at the then current rate of exchange, making \$3,240, which by order of said *U.* they passed to the credit of said *B.* on the 30th July, 1839, and on the 1st September, 1839, said *U.* in pursuance of the above agreement, entered into a copartnership

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with said *B.*, under the firm of *C. B. & Co.*; at this time *B.* had a valuable stock of goods, which passed to the new firm; and defendants admit that the debts due to as well as by said *B.* also passed to said new firm, which became entitled to receive the former as well as bound to pay the latter; that after the establishment of *C. B. & Co.* this defendant, *T. R.*, thinking that the bill of sale above mentioned might not avail to secure the debts due by *C. B. & Co.* to *Albers & Co.*, applied to said *C. B. & Co.*, and requested them to execute a new bill of sale, which they did on the 2nd December, 1839; that said bill of sale, like the former, states on its face that it was made for the consideration of \$10,000, but at the time of its date there was due from *C. B. & Co.* to *Albers & Co.*, the sum of \$6,418.73, and *Albers & Co.* had become responsible for *C. B. & Co.*, by endorsing their paper to the amount of \$2,264 more, making in all \$8,682.73, at the date of said bill of sale; and it was the intention of said bill of sale, and was so expressly understood between the parties thereto, that it should stand as a security, both for the sum then due and for the notes on which said *A. & Co.* had become liable as endorsers as aforesaid, as well as for all subsequent debts which might become due from said *B. & Co.* to said *A. & Co.*, to an amount not exceeding \$10,000, at any one time, and these defendants wholly deny that the object of either of said bills of sale was to give to said *A.*, or the said *A. & Co.*, an undue, illegal and improper preference, or to hinder, delay and defraud the rest of the creditors of the said *B.* or *B. & Co.*; that the object of both bills of sale was to give *A.* and *A. & Co.* a legal security for the important assistance which they rendered, first to *B.*, and afterwards to *B. & Co.*, and that the intention of the second bill of sale was merely to carry out, in good faith, the agreement originally entered into, and that there was no other consideration for said bill of sale than that stated. The answers then denied that the execution of the bills of sale, or the debts due to them, or the knowledge they had of the condition of the firm of *C. B. & Co.* were in any way kept secret by them from the rest of the creditors; that said bills of sale



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were duly recorded, which was notice to all the world; and that defendants had no knowledge or suspicion that said *B.* was insolvent. The answer then proceeded to set forth a variety of transactions between said partners, and first heard of insolvency of the firm of *B. & Co.*, in February 1840, when sued, examined their books and so found it; that on the 21st August 1840, said *R.* demanded of *U.* (his partner *B.* being then absent,) delivery of the goods conveyed by said bills of sale for the payment of their debts, said *U.* accordingly delivered up to him the said goods. The answers also denied that the greater part of the goods as aforesaid, delivered to the defendants, was not included in said bill of sale, on the contrary, that all of said goods were in the possession of *B. & Co.*, at the time of the execution of said last mentioned bill of sale, and were included within it, except a few pieces, amounting to about \$270 in value.

The defendants then set forth in extenso the accounts between the parties, with a great variety of details and exhibits, and denied all manner of fraud or collusion.

A commission was then issued, under which was proved:

The bill of sale of 2nd December 1839, from *C. B. & F. U.*, for and in consideration of the sum of \$10,000, in hand paid by *A. A. & T. R.*, granted, bargained and sold to *A. A. & Co.*, &c., "all the goods, merchandize and furniture, now remaining, standing and being in the store No. 95, in *Baltimore St.*, and now in the occupation of us the subscribers, trading under the firm of *C. B. & Co.*, that is to say, 250 pieces of silk goods, &c., as also all the outstanding debts, promissory notes and other evidences of debt, belonging to us, or any one of us, and all future proceeds and avails arising from sales of the goods of said store;" and provided, that in case I the said *C. B. & Co.*, their, &c., shall well and truly pay to the said *A. & Co.* the said sum of \$10,000, with interest for the same, on or before the 2nd March 1840. Recorded on the 4th Dec. 1839. The bill of sale of the 16th August 1837, from *C. B.* to *Anthony Albers*, was similar to that above, and was recorded on the day of its date.

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Under the commission, the proceedings of *C. B. & F. U.*, as insolvent debtors, were also proved, with a great variety of accounts, notes, letters, schedules of goods, accounts of sales, and accounts current, were also proved to show the condition of the house of *C. B. & Co.*, before, and at the time of failure, and the claims of the defendants as their creditors.

The complainant, in offering the proceedings of the two insolvents, *C. B. & F. U.*, before the commissioners of insolvent debtors, limited his offer.

1. To show that they had made such application, and the time of making it.

2. To his due appointment and bonding as trustee.

3. To affect the credit due to the said insolvents, who were both sworn as witnesses for the defendant, and who vary in their statements as such witnesses, so far as their answers to interrogatories before the said commissioners may affect them.

The defendant excepted to the admissibility of the said proceedings, as evidence for any other purpose than that stated in the complainant's offer.

The Chancellor, (BLAND,) on the 20th of January 1842, dismissed the bill with costs, being of opinion, that at the time of the execution of the deed of 2nd December 1839, by the debtors *B. & U.* to their creditors *A. & R.*, that they had notice of the condition of insolvency of their said debtors, if they were then in fact in such a condition.

From this decree the complainant appealed.

The act of 1825, ch. 50, declared that no mortgage or deed of that nature shall operate, either in law or equity, as a lien or charge on any estate or property whatsoever, for any other or principal sum or sums of money, than the principal sum or sums that shall appear on the face of such mortgage, and be specified and recited therein, and particularly mentioned and expressed, to be secured thereby, at the time of executing the same.

The act of 1834, ch. 293, entitled, "A further supplement to the act, entitled, an act relating to insolvent debtors in the

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city and county of *Baltimore*, sec. 1, enacted, that in all cases of applications hereafter to be made for the benefit of insolvent debtors, under the act to which this is a supplement, or any supplement thereto, all conveyances, assignments, sales, deliveries, payments, conversions, or dispositions of property or estate, real, personal or mixed, debts, rights or claims, or confessions of judgment that shall be made, or caused or allowed to be made, whether upon request or otherwise, by any applicant to, or in favor, or with a view to the advantage or security of, and with intent to prefer any creditor or creditors, security or securities of such applicant, when such applicant shall have had no reasonable expectation of being exempted from liability or execution, for or on account of his debts, without applying for the benefit of the insolvent laws as aforesaid, shall be deemed within the meaning and effect of the sixth section of the act to which this is a supplement, to have been made with a view, or under an expectation on part of the applicant, of being or becoming an insolvent debtor, and with an intent thereby to give an undue and improper preference; *provided*, however, that the provisions of this section shall not apply as against any person or persons claiming, by virtue of any assignment or conveyance, for valuable consideration, from or under the creditor or creditors, security or securities, their heirs, executors or administrators, nor to any case where the said creditor or security shall appear not to have had notice of the consideration of insolvency as aforesaid of said debtor.

The cause was argued before ARCHER, DORSEY and CHAMBERS, J.

By COLE and REVERDY JOHNSON for the appellant, and  
By BRUNE and McMAHON for the appellees.

ARCHER, J., delivered the opinion of this court.

The bill in the present case has been filed to vacate a deed of mortgage given by *Brecht* and *Uhthoff* to *Albers* and *Runge*, on the 2nd day of December, 1839, to obtain an account and payment for the goods and promissory notes delivered over to



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*Albers and Runge* in pursuance of said deed, and for the payment over to the complainants of the sum of three thousand two hundred and forty dollars, with interest, which was applied by *Uhthoff* (in contemplation of a partnership to be entered into by him with *Brecht*) to the payment of a debt due by *Brecht* to *Albers & Co.*

The deed in controversy is alleged to be void as in violation of the insolvent laws, to be condemned at common law, and inoperative under the act of Assembly of 1825, ch. 50, entitled "An act to limit the operation and effect of mortgages."

There can be no pretence for considering the deed void by the insolvent laws existing anterior to the law of 1834, ch. 293, because, in our view, the evidence, taken in connexion with the answers, it is, by no means, satisfactory that the mortgagors, at the time of executing the deed, contemplated taking the benefit of the insolvent laws. The deed could not, therefore, be condemned as made with a view, or under an expectation, of being or becoming insolvent debtors, and with intent thereby of giving an undue and improper preference. Nor could it be set aside, within the meaning of those laws, since the decision of this court in the case of *Crawford & Selman* vs. *Taylor*, being made at the request of the mortgagees.

It is, however, contended that the deed is void as being made in contravention of the act of 1834, ch. 293, which, so far as regards the present question, appears to be a local law, confined to the city and county of *Baltimore*. This law provides that although the transfer shall be made upon request, yet if the bargainor, at the time of conveyance, had no reasonable ground for believing that he would be exempt from execution or liability for his debts, without applying for the benefit of the insolvent laws, such conveyance should be considered as made with a view or under an expectation of being or becoming an insolvent debtor, and with intent thereby to give an undue and improper preference, provided the creditor obtaining the conveyance should appear not to have had notice of the condition of insolvency of such debtor.

Without stopping to enquire whether the debtors in this case had any reasonable expectation of exemption from lia-

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bility or execution, on account of their debts, otherwise than by taking the benefit of the insolvent laws, it will be sufficient for us to say that we are satisfied that the mortgagees had not notice of the insolvent condition of the mortgagors. Our belief on this subject is derived from the fact that money was loaned and goods sold after the date of the deed, and that notes were taken for the payment of their debts to the creditors, *Albers & Runge*, in semi-monthly instalments; all which circumstances would not be likely to have occurred if the mortgagors had been considered as insolvent, or in such a condition that they had no reasonable expectation of being exempt from liability or execution for their debts, except by taking the benefit of the insolvent laws. No inferences can be drawn, prejudicial to the mortgagees, from the examination of the books of the mortgagors, by one of the mortgagees, because, as far as the character of that examination is disclosed by the testimony we cannot perceive that it was calculated to impart information in relation to the condition of the firm either as to solvency or insolvency. We have no evidence that enquiries had been made into the extent of the assets of the mortgagors, or the extent of their liabilities, by enquiry into which alone could any judgment have been formed, or any notice be attributed. And here we must be permitted to remark, that according to our construction of the act under consideration, the notice which is to vitiate a conveyance is not a technical or constructive notice, but an actual notice, derived from a knowledge of the condition of the mortgagors.

The next subject submitted for enquiry is the validity of this deed at common law. Its invalidity on the mere ground of preference, cannot, upon legal principles, be urged, for a debtor has a right to prefer one creditor to another by the common law, and independent of our statutes, in relation to insolvent debtors.

The consideration proved, if the proof be admissible, establishes clearly a good and valid consideration to support the deed. The evidence *dehors* the deed is that the deed of mortgage was made to secure advances made, and to be

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made, to the extent of \$10,000. The consideration stated in the deed is \$10,000, in hand paid; and it is averred the deed is taken as a mortgage to secure that sum. The only question, in this branch of the case, is whether this evidence is admissible. Evidence cannot be admitted which would have the effect of changing the character and legal operation of the deed, as in the case of *Hern & Soper*, where a deed purports to be made on a monied consideration it cannot be shown that money did not constitute the consideration, because this would have the effect to change the character of the deed; and in *Betts and the Union Bank*, it was decided that where a deed is impeached for fraud, and the consideration stated is money, it will not be allowable to set up a different consideration, as marriage, to support the deed. In such a case the effect of the evidence, if admitted, would have been to change the deed from a deed of bargain and sale to a covenant, to stand seized to the use of the grantee.

In the case now before us the admissibility of the evidence would produce no such result. The bill admits, and it is fully proved, that a monied consideration existed for the deed. Advances had been made to the mortgagors, though not to the extent mentioned in the deed; so that the instrument would, in contemplation of law, be a deed of bargain and sale, standing on the consideration proved in the same way as it would be if standing on the consideration expressed in the deed. In the case of *Betts and the Union Bank*, the evidence could not be received, because by the disproof of the consideration expressed, the deed had been rendered inoperative and void, and parol evidence of a different consideration could not be received to set up the deed thus impeached. But here the deed is not impeached or rendered inoperative and void, by the evidence offered, but the evidence is adduced to rebut any idea of fraud, by showing, not a different consideration, but the same kind of consideration, differing only in amount, and the circumstances under which it assumed this shape. And this, it will be perceived, was the view of the case of *Betts and the Union Bank*, taken by this court, in 9 *Gill & John*. 91, and 10 *G. & J.* 248.



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The design of the law-makers in the passage of the act of 1825, ch. 50, was to prevent liens on property, to the prejudice of creditors, for amounts and claims never contemplated by the parties at the time of its execution, and of which the deed, by its terms, gave no notice: as if a deed were executed to cover a mortgagee against all future liabilities of any and every description, which the mortgagor might incur or be responsible for, to the mortgagee. Under such a deed, what would have prevented the mortgagee from purchasing up claims at a depreciation against the mortgagor, to indefinite amounts, and thereby acquiring priority, to the prejudice of creditors. A practice prevailed anterior to the act of 1825, ch. 50, of taking mortgages for specified sums of money, greatly below the value of the mortgaged premises, with a clause or clauses providing that the mortgaged premises should be held as a security for all future liabilities or advances by the mortgagee to the mortgagor, by which means the creditors of the mortgagor were defrauded, sometimes by fraudulent combinations between the mortgagor and mortgagee, or by the acts of the mortgagee alone, who, after the known insolvency of the mortgagor, purchased up liabilities of the mortgagor at depreciated rates, and held them as liens on the mortgaged premises for their nominal amounts; thus excluding a portion of the creditors from an equal dividend of the mortgagor's estate. Creditors becoming such after the date of such mortgage, were deluded and suffered loss, which no precaution could guard them against. Such transactions the law was designed to meet; but not a case like this, where the amount is stated; where the world is apprised of its limits, and where the parties design to cover all advances which may be made, to the extent of the sum limited in the mortgage. In the mortgage now under consideration, no one could be deceived or prejudiced.

The views which we have above taken, disposes of the various questions raised in the case, and concurring with the Chancellor in his judgment, we affirm his decree.

DECREE AFFIRMED.

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Gardner and Hughes, ex'rs vs. Simmes, a. d. b. n.—1843.

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GEORGE GARDNER AND JOHN HUGHES, EXECUTORS OF ELIZABETH REEVES, vs. JOSEPH E. SIMMES, A. D. B. N. OF THOMAS C. REEVES.—*December 1843.*

After a period of near fifteen years, in the absence of all proof to the contrary, the orphans court, in reviewing the proceedings of an executor, should assume the payment of all debts and legacies. This presumption rests on the duty of the executor, and his due discharge of it.

As to legacies bequeathed to an executor, the law will assume that he holds as legatee, after the lapse of a sufficient period allowed for the settlement of the estate. What would be regarded such a period, might depend on the peculiar circumstances of each case.

The acts of 1798, ch. 101, and 1820, ch. 161, confer jurisdiction on the orphans court to coerce the delivery over of property, or *choses in action*, or payment of money, by the representative of the executor or administrator to the administrator d. b. n. of the first deceased, only in case the property, *choses in action* or money, belonged specifically to the deceased while alive, and remained in the hands of the executor and administrator as such, and not as legatee; or in case the *chose in action*, &c., was received by the executor or administrator in that capacity, and was so retained until his death.

In such cases the orphans court may decree the delivery up of the specific property, so retained, but cannot decree its nominal or estimated value.

APPEAL from the *Orphans Court of Charles County.*

On the 26th October 1841, *Joseph E. Simmes*, a. d. b. n. of *Thomas C. Reeves*, filed his petition in the said court, claiming of the executors of the late *Elizabeth Reeves*, the property contained in list No. 1, and the money in list No. 2, and prayed the court so to order and adjudge in his favor.

*List No. 1.* Property, the executors of *E. R.* have not paid over, for which the appellee holds them responsible, viz:

Negro man *Gusty*, carpenter.

Also various articles, as fodder, grain, horses, cattle, agricultural implements, tobacco, and household furniture, &c.

*List No. 2.* Of notes due the estate of *T. C. R.*, all of which executrix believes to be good, \$1,140; judgments \$735; open accounts \$121.84.

The list of debts was proved by the executrix the 13th of March 1826, before the register of wills.

The appellants answered the petition of the appellee, and alleged that *Thomas C. Reeves* died in the year 1826, having

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first made his last will and testament, and thereby devised one-half of his personal estate to his wife *E. R.* for ever, and the other half to his said wife for life, and then over to *Thomas Simmes* and others; that *E. R.* took possession of all of said property, and used it as devised to her, and in the use of said property, all that mentioned in list *number one* was consumed and perished, except negro man *Gusty*; and said executors contend they are not responsible for said property, except for the value of said negro man at the time of *Mrs. Reeves'* death, which happened in 1840, and they pray the court to award the value of said negro in 1840, to be paid to them by the said petitioner. And they further answer, that the said list of debts mentioned as list *number two*, was returned by *E. R.*, as due the estate of *T. C. R.*, but she has not said whether they are sperate or desperate, and they do not know whether they were collected or not, or how much, or what amount of said claims have been collected. They find the note of *Thomas Simmes* for \$600, dated 14th January 1819, with the papers, and not paid. That respondents are not responsible for interest on said notes until the death of *Mrs. Reeves*, in 1840. They admit that said petitioner is entitled to a proportion of the hires of negroes the year of *Mrs. Reeves'* death, and are willing to pay the just and fair proportion of said hires over to petitioners.

The will of *Thomas C. Reeves*, filed with the answer, was dated on the 4th August 1825, and proved on the 6th December of that year. It devised certain tracts of land to his wife in fee, and other land to her for life, and then all the rest and residue of his real estate, after other devisees of real property, to his wife in fee. The will then devised as follows:

“*Item.* I devise and bequeath to my beloved wife *Elizabeth Reeves*, the use of all the rest and residue of my personal estate, during her natural life, and at her death, one-half of said personal estate *to her heirs for ever*; one-third part of the remaining half of said personal estate, I bequeath to *Thomas Simmes*, and the residue to *Elizabeth Gutterick*, *Susanna Reeves* and others, to be equally divided between them.

The will constituted *Elizabeth Reeves* sole executrix.



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The orphans court decreed that the administrator d. b. n. of *Thomas C. Reeves* is entitled to the sum of \$1,158, being the value, at the time of the death of *Elizabeth Reeves*, of negro *Gusty*, and articles not belonging to *E. R.* absolutely, but in which she had a life estate only, with interest on the said sum from the death of the said *E. R.*, and also to the sum of \$1,-981.84, being the amount of good debts due to said *Thomas C. Reeves*, contained in exhibit No. 2, with interest thereon from the time of the death of said *E. R.*, and also to the hires of negroes belonging to the estate of *T. C. R.*, from the time of the death of *E. R.* till the end of the year in which said *Elizabeth* died, for all the negroes hired out that year, at the rate they were hired, with interest thereon from the end of the year, and also for all other of said negroes held by the executors of *E. R.* from the time of her death until paid over to the administrator d. b. n. of *T. C. R.*, with interest thereon from the time the negroes were paid over. And we further decree, that the executors of *E. R.* shall pay over and settle the said several sums of money and interest, to and with the said administrator d. b. n. of said *T. C. R.*, and pay costs.

From which decree the executors of *E. R.* appealed to this court.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS and SPENCE, J.

By P. W. CRAIN and McMAHON for the appellants, and  
By J. JOHNSON and R. JOHNSON for the appellees.

CHAMBERS, J., delivered the opinion of this court.

The will of *T. C. Reeves*, by the clause which gave the residuum of his personal estate to his wife, passed to her an absolute interest in one moiety thereof, and an estate for her life in the other moiety. There is no allegation on the one side, nor admission on the other, that any of the debts or legacies were unpaid by *Mrs. Reeves*, the widow and executrix of *T. C. Reeves*, in 1840, when she died. Letters testamen-

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Gardner and Hughes, ex'rs vs. Simmes, a. d. b. n.—1843.

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tary had been granted to her in 1825, and after a period of time little less than fifteen years, the orphans court, or this court, in reviewing its proceedings should assume the payment of all debts and legacies in the absence of proof to the contrary.

This presumption rests upon the ground that it was the duty of the executrix to discharge the debts in a due course of administration, and in the period within which, by law, she could be compelled to pay them, and then to pay and deliver the legacies bequeathed by the will. As to such legacies as were bequeathed to herself the law will assume that she held them as legatee after the lapse of a sufficient period allowed for the settlement of the estate. What would be regarded such a period might depend upon the peculiar circumstances of each particular case, and we do not deem it necessary to define the minimum limit, it being sufficient to say in this case the period has been long enough to satisfy more than the largest demand in that respect. *Mrs. Reeves* must therefore be regarded as being in possession, as legatee, of whatever was bequeathed to her; and in that view of the case there is no room for the application to this case of the law claimed by the appellee. The acts of 1798 and 1820, confer jurisdiction on the orphans courts to coerce the delivery over of property or *chose in action* or payment of money by the representative of the executor or administrator to the administrator de bonis non only in case the property, chose in action or money belonged specifically to the deceased while alive, and remained in the hands of the executor or administrator as such, and not as legatee, or in case the *chose in action*, or money was received by the executor or administrator in that capacity, and was so retained in that character till the death of such executor or administrator.

In looking through the record we find one item in regard to which there may be collected from the answer of the appellants facts which may prevent the conclusion otherwise inferrible from the lapse of time that it was not held by *Mrs. Reeves* at the time of her death as executrix.

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In that answer it is said, “they find the note of *Thomas Simmes* among the papers and not paid;” and the respondents go on to disclaim all obligation to pay interest on this, as on any and all the other, debts claimed by the petition; this debt or note of *Thomas Simmes* being one of the debts due to the testator *Thomas C. Reeves*, at the time of his death, and mentioned in the list of debts returned by his executrix. It is proper, therefore, that the appellee should have the opportunity of proving, if the fact be so, that this note did remain in the hands of *Mrs. Reeves*, as executrix, at the time of her death, in which event the orphans court will be authorised to decree its delivery to the appellee; but they cannot decree its nominal or its estimated value. Indeed, the orphans court seems to have totally mistaken the whole scope and purpose of the acts of Assembly in regard to their authority in this respect. In no event have they power or jurisdiction, under these laws, to decree the payment of value in such cases, but only the delivery of property and choses in action or payment of money specifically.

DECREE REVERSED, AND CAUSE REMANDED.



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Casey's lessee *vs.* Inloes, et al.—1844.

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JUNE TERM 1844.

ELIZABETH CASEY'S LESSEE *vs.* WILLIAM INLOES, JOSHUA INLOES, JAMES HOOPER, JONATHAN CHAPMAN, AND WILLIAM TYSON.—*June Term 1844.*

A prevalent opinion, in the neighborhood of the premises claimed in an action of ejectment, even if known and adopted by the lessor of the plaintiff, as to her legal rights, whether founded in error or not, does not, at law, prevent the running of the statute of limitations, nor repel the legal presumption of a grant arising from long continued, and acquiesced in, adverse possession.

A certified copy of the rent-roll, extracted from the debt books of the Lord Proprietary, under the hand and seal of the Register of the Land office, having relation to the possession of the tract of land claimed in an action of ejectment, is competent evidence for the defendant in all cases of controverted possession, or when possession is relied on as evidence for the presumption of a grant.

The rent-rolls are books which were kept in the several counties of the State, during the Proprietary Government, by officers called rent-roll keepers, and were designed to show, in the respective counties, the grants of land made by the Lord Proprietary, the names of the subsequent alienees thereof, of those who were in possession of the same, and the quit-rents with which they were chargeable.

An escheat patent is conclusive evidence of the fact of an escheat grant.

Extracts from the rent-rolls may tend to disprove possession under an escheat patent, in a particular person, at a given period, by *not* showing that such person, at such period, was in possession, nor that quit-rents were charged to him on account of such escheated lands, as also by showing that others were charged therefor.

Where a tract of land was patented in 1663, and no conveyance from the patentee, but a deed for the same land in 1695 was in proof, from *W.* to *J.*, and another deed for the same tract in 1689, from *B.* to *T.*, with proof of title, from *T.* to the lessor of the plaintiff, who brought her action of ejectment in 1841, but no evidence that *W.*, *J.*, or *B.* had ever been in possession, or how *W.* or *B.* acquired or claimed title, the court cannot be called upon to instruct the jury that they are bound to presume a deed from the *patentee* or those claiming under him, to *W.*, or from *J.* to *B.* or his ancestor, for such tract of land; though it would have been competent to have required an instruction to the jury that they must presume a deed from the patentee, or those claiming under him, to *B.*, from whom the paper or record title was perfect.

A continuous possession of twenty years or upwards, in a party, or those claiming under him, will authorise him or them to supply the absence of a conveyance to such party from one seized before him, by requiring the court to instruct the jury to presume such a conveyance.

No direct proof of possession in a given party can be reasonably expected after a lapse of one hundred and fifty years.

The certificate of the surveyor of the county, made in 1698, that a tract of land began at a bounded white oak, standing in the *line of a parcel of land* formerly belonging to *M.*, "*and now in the possession of the aforesaid T.*," returned to the land office about nine years after a deed to *T.*, is evidence of *T.*'s possession of the land referred to as formerly belonging to *M.*

So proceedings in ejectment, commenced in 1704, by *C.* against *H.*, the grantee of *T.*, in which the premises sued for were described as *late in the tenure and occupation of T.*, and the lessor of the plaintiff, recovered judgment upon title derived from *H.*, are evidence that *T.* had been in possession, is confirmatory of the surveyor's certificate, and that *H.* was in possession at the institution of the suit.

A recital in a deed, dated in 1756, professing to be made by the son and heir-at-law of one joint tenant, conveying land to the surviving joint tenant, and declaring that he "now continues as survivor, seized, and yet is actually seized of such lands," is evidence in 1843, that such survivor was possessed at the date of the deed.

Where a plaintiff in ejectment deduces a regular paper title from two grantors, the possession of either, the other necessary circumstances concurring, will enable him to ask the presumption of a conveyance to the party in possession.

It is not universally true that possession of land is a matter of fact which must be proved by the same kind of testimony requisite for the proof of any other fact or occurrence.

Possessions of modern date, susceptible of proof by living witnesses, may be within the general rule; but as to those of such antiquity, that the brevity of human life demonstrates that such proof cannot be had, these are not within the rule.

Certificates of public surveyors, entries in debt books, recitals in deeds of ancient date, are evidence to prove ancient possession of lands.

Facts of great antiquity, resting wholly in parol, of which no written evidence can be presumed to exist, may be established by hearsay evidence.

A plaintiff in ejectment, who claims title under two grantors, is not estopped from setting up the paramount title of the one, or alleging that he derived no title from the other.

The true principle of estoppel, as applicable to deeds, is to prevent circuity of action, and to compel parties to fulfil their contracts; thus, a party in a deed asserting a particular fact, and thereby inducing another to contract with him, cannot, by a denial of that fact, compel the other party to seek redress, against his bad faith, by suit; but the court will decide upon the rights of the parties, without subjecting them to the expense and delay of a new litigation; and this they will do, not on the ground of concluding the parties from showing the truth, but because the whole truth being shewn, the justice of the case is not changed.

The general principle is well established, that possession of a part of a tract or parcel of land, by him who is legally entitled to the entirety, carries with it possession to the extent of his legal rights; and no wrong-doer can, in contemplation of law, by entry, or the exercise of acts of ownership thereon,

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acquire the possession of any part thereof, but by actual enclosure, or ouster, actual or presumptive.

The grounds on which the presumption of a deed rests at law, are, that the rightful owner has so long submitted to acts of ownership over his property, exercised by another, without ever having sued for the recovery of his property, or damages for the unlawful invasion of his rights, that he is presumed to have granted them to him, by whom the acts of ownership are exerted.

By the act of 1745, ch. 9, sec. 10, "all improvements, of what kind soever, either wharfs, houses, or other buildings, that have or shall be made out of the water, or where it usually flows, (as an encouragement for such improvers,) be forever deemed the right, title and inheritance of such improvers, their heirs and assigns forever." In the year 1698, a patent issued for a parcel of land called *M's Neck*, lying in *Chesapeake Bay*, and on the N. side of a river called *Patapsco*, and on the N. side of the N. W. branch of said river: Beginning at a marked red oak by a little branch, and running up along the N. W. branch, for breadth, W. N. W. 100 p. over a cove unto a marked white oak, &c. HELD:

1st. That the patentee of this land, and those claiming under him, had by virtue of the act of 1745, a mere privilege of acquiring property by its reclamation from the water; that until reclaimed, she had no property; no possession; no right, under that act.

2nd. That a party, by erecting a fence for thirty years and upwards, on a part of the low grounds adjacent to such tract designated as the cove, in front of that part of *M's Neck* claimed by the plaintiff, which was covered by the flow of the tide, and claiming below it, did not furnish evidence of such an uninterrupted, continuous possession, as was essential to the presumption of a grant to the person making and extending such fence.

3rd. That being erected on navigable water, without the limits of the land owned by the patentee, it gave him no right of action.

4th. That ejectment would not lie, there being no title in the land.

5th. That trespass, in which the law implies an injury, whether sustained or not, could not be maintained for want of ownership in the soil.

6th. A party in possession of land adjacent to a navigable stream, who runs a fence from his land into the stream, across the front of another adjacent proprietor, gains no possession by such an act, which is in itself a trespass.

The principle, that where one stands by and sees another laying out money upon property, to which he has himself some claim or title, and does not give notice of it, he cannot afterwards in equity and good conscience, set up such claim or title, does not apply to an act of encroachment on land, the title to which is equally well known, or equally open to the notice of both parties; but the principle applies only against one, who claims under some trust, lien or other right, *not* equally open and apparent to the parties, and in favor of one who would be misled or deceived by such want of notice.

Where defence is taken on warrant of resurvey, all possessions, whether relied on to prove title, for illustration, or to disqualify witnesses examined on the survey, must be located on the plots of the cause.

Where several defendants, in an action of ejectment, claim title to several and distinct parcels of the land sued for, as by separate and independent leases,



and there is no evidence to show any possession in any person under whom two or more of the defendants claim to derive title, a presumption of a grant, founded on the possession of the claimant of one lot, cannot enure to the benefit of the claimant of a separate and distinct lot, of which no such possession had ever been held.

The presumption of a grant is an inference of law arising out of particular facts, and may exist, although the jury, in their consciences, may disbelieve the actual execution of any such grant.

A prayer made in such form or terms that it would have a tendency to mislead the jury, as in the necessity of finding as a fact, what is an inference of law, should not be granted.

In a case where a jury may be authorised to presume a grant to defendants in possession, such presumption may be made, either of a grant from the plaintiff, or from any person under whom the plaintiff derived title, according to the proof.

Upon every discontinuance of the possession of a wrong-doer, by operation of law the possession of the rightful owner is restored, and nothing short of an actual adverse and continuous possession for twenty years can destroy his right, or vest a title in the wrong-doer.

When a court as an inference of law, arising from proof of possession, directs a jury to presume a deed, it is done upon principles of public policy, for the protection of ancient possessions.

All that the law requires to raise the presumption is, that the possession should have been actual, adverse, exclusive, and continuous, and under claim of title.

A party cannot call upon the court to instruct the jury where defence is taken on warrant, as to the effect of a patent not located upon the plats, nor given in evidence to the jury.

The court cannot be called upon to say that an original patent must be construed by reference to its relation to another patent, founded on a resurvey of the same land, where the second patent did not appear in evidence, and where the same parties claimed under both patents.

Upon an escheat the State takes as the *ultimus hæres* of that, to which, the person was entitled, whose death, without heirs, created the escheat.

An escheat grant, in one sense of the term, is the creation of a *feudum novum*; the grantee takes the property granted as a new fief or feud, so far as regards his relationship, obligations, and duties to the State, and the estate, upon the terms specified in the grant.

But the limits, privileges, appurtenances, and priorities of the estate granted by escheat patent, and the liens and incumbrances to which it may be subjected, exist independently of the inquiry, whether the grant be of an ancient or a new feud.

The State acquires by escheat, not only that which was originally granted, but all the rights, privileges, priorities and appurtenances incident to the land itself, and with which it was held by the person who died seized without heirs.

The escheat grantee, upon the terms specified in his grant, takes the estate granted in the same condition in which it may have devolved on the State, ex-

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cept so far as it may be affected by the doctrine of merger or extinguishment. An escheat grant relates to the original grant, and passes to the escheat grantee all that passed to the original grantee, and which was held by him, whose death, without heirs, occasioned the escheat.

The relation of the escheat grant to the original grant is not intercepted by an intermediate patent, unless, at the time of granting the same, the escheat right had accrued.

Until the occurrence of the event which constitutes the escheat, the interest of the Lord Proprietary in relation to it, was a mere possibility, and could not be the subject of a grant.

The doctrine of estoppel does not apply to grants made by the State. They only pass the title which the State had at the time of the grant, and not that subsequently acquired.

An escheat grant is *prima facie* evidence that the land granted is liable to escheat, at the date of issuing the escheat warrant, and not antecedently.

*M.* was patented in 1663. In 1734, *J.*, including a part of *M.*, was also patented, and in 1737 an escheat warrant and patent issued for *M.* The two last patents were granted to *P.*, under whose devisee, the plaintiff claimed *M.* by his deed of 1758. **Held:** that the conveyance passed *M.*, as it was held under the original patent of 1663, be the effect of the patent of *J.* what it may.

As far as regards any conflict of rights *between the parties to this cause*, the defendants, under the act of 1745, had a right to extend westwardly in front of their lots to the west side of *Caroline* street and no further; and the lessor of the plaintiff had a right to extend her grounds to the City Dock, on the south side of *Lancaster* street.

A grant, though for the most part covered with water, still passes to the grantee all the soil under the water, included within its outlines, with all the rights of property incident thereto, subject only to the rights of the public as to fishing and navigation. If encroached on, the grantee may maintain trespass or ejectment.

The act of 1745, ch. 9, never was designed to give one land-holder the power of extending his improvements over the land of another.

The right of the riparian proprietor to extend his improvements into the water, is intercepted by a grant from the State to another person of the land covered by the water of a navigable stream, over which such proprietor might otherwise have been entitled, under the act of 1745, to make improvements.

The heir of lessee for a term of years of a lot bordering on the water, under the act of 1745, ch. 9, sec. 10, is not the riparian proprietor of such lot.

Where possession was essential to the acquisition of title to land, and title to the creation of a riparian right, any prayer founded on that right, which did not submit the fact of possession to the jury, should be rejected.

APPEAL from *Baltimore* County Court.

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This was an action of *Ejectment*, commenced by the appellant on the 20th August 1841, who declared for all that lot or piece of ground on *Fell's Point*, in the city of *Baltimore*: Beginning for the same at the south-west intersection of *Alice Anna* street and *Caroline* street, and running westerly on *Alice Anna* street one hundred and seventy feet to *Spring* street, (formerly *Petticoat* alley,) and then southerly, bounding on the east side of *Petticoat* alley, or *Spring* street, to the water of the dock commonly called the *City Dock*, then easterly bounding on the water of said dock to *Caroline* street, then northerly bounding on *Caroline* street to the beginning, containing one and an half acre of land, more or less, with the appurtenances, situate and being in *Baltimore* county aforesaid, which *Elizabeth Casey* had demised, &c.

The defendants pleaded not guilty, and took defence under the warrant of resurvey for all the land lying between the west side of *Caroline* street and the east side of *Spring* street, and the south side of *Alice Anna* street and the north side of *Lancaster* street.

1ST EXCEPTION. At the trial of this cause the plaintiff to support the issue on her side, offered in evidence the following papers, to wit:

A patent granted by the *State of Maryland* to *Alexander Moutenay* for *Moutenay's Neck*, dated 30th June 1663.

A deed from *Robert Blunt* to *James Todd*, 4th October 1695.

A deed from *James Todd* to *John Hurst*, of the 3rd March 1701.

A deed from said *Todd* to *Charles Carroll*, of the 16th June 1701.

And the deed of mortgage from *John Hurst* to *Richard Colegate*, of the 13th October 1702.

A deed from said *Hurst* to *Thomas Sheridine*, *Thomas Sligh*, of the 19th March 1749.

The will of *Richard Colegate*, 8th of August 1721, devising *Moutenay's Neck* to his two sons, *John* and *Thomas Colegate*.

A deed from said *John* and *Thomas Colegate* to *Thomas Sheridine* and *Thomas Sligh*, of the 15th November 1750.



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A deed from *Thomas Sheridine* to *Thomas Sligh*, of the 26th June 1756.

A deed from *Charles Carroll* to *Thomas Sligh*, of the 31st May 1759.

A deed from *Thomas Sligh* to *Thomas Hammond*.

The grant of *Alexander Mountenay* for 200 acres in *Patapsco* river, *Mountenay's Neck*, described the land as follows, to wit:

A parcel of land called "*Mountenay's Neck*," lying in *Chesapeake Bay*, and on the north side of a river called *Patapsco*, and on the north side of the north-west branch of the said river: Beginning at a marked red oak by a little branch, and running up along the north-west branch, for breadth, west-north-west one hundred perches over a cove unto a marked white oak, by a line drawn north-north-east running into the woods, for length, three hundred and twenty perches by a line drawn from the said north-north-east line, running east-south-east one hundred perches, by a line from the said east-south-east line running south-south-west unto the first marked red oak three hundred and twenty perches, containing and now laid out for two hundred acres, more or less; together with the rights, profits and benefits thereunto belonging, (royal mines excepted.) To have and to hold the same unto him the said *Alexander Mountenay*, his heirs and assigns forever, &c.

*ROBERT BLUNT* to *JAMES TODD*, IN FEE. This indenture describes the land as all that parcel of land called "*Mountenay's Land*," lying on the north side of the *Patapsco* river, in the Province aforesaid: Beginning at a marked red oak, by a little branch, and running up the north-west branch west-north-west one hundred perches, over above to a marked white oak standing on a point, then running north-north-east into the woods three hundred and twenty perches, then running east-south-east one hundred perches, then running south-south-west three hundred and twenty perches to the first marked tree, for two hundred acres of land, more or less; together with all the profits, rights and benefits thereunto belonging, or in any wise appertaining. To have and to hold, &c.

**JAMES TODD deed to JOHN HURST.** This indenture described the land conveyed by it in fee as one hundred and thirty-five acres and one half of one acre of land, being part of a certain tract or parcel of land called and known by the name of "*Cole Harbour*," lying and being in the county aforesaid; and also one hundred sixty and four acres and one half of an acre of land, being part of another tract or parcel of land formerly belonging to *Alexander Mountenay*, late of the aforesaid county and province, deceased, and purchased by the said *James Todd*: Beginning at a bounded white oak on a point, being the first bounded tree of *Cole Harbour*, by the north-west branch, and running down the river or branch east-south-east, for breadth, one hundred and forty perches to a locust post on a little point, and then with a line drawn north-north-east with the line of *Mountenay's* land, for length, two hundred and twenty-four perches to a bounded white oak standing in the said line, then with a line drawn west-north-west one hundred and forty perches to a red oak standing in the north-north-east line of the said land of *Mountenay's*, then running with the said land south-south-west fifty-six perches to a white oak, then with a line drawn north-west, two degrees south, for the length of two hundred and four perches to a gum tree standing near the said branch, then with a line drawn south-south-west seventy-five perches to a white oak standing in the corner of the old field by the falls or branch aforesaid, then with a line drawn south-east and by south to the said branch, and with the said branch south-east and by south to the first bounded tree, surveyed and laid out for three hundred acres of land, more or less, to be holden of the manour of *Baltimore*; together, &c.

**JAMES TODD deed to CHARLES CARROLL.** This indenture, made the sixteenth day of June, in the year of our Lord one thousand seven hundred and one, between *James Todd* of *Baltimore* county, gentleman, and *Penelope* his wife, of the one part, and *Charles Carroll* of *Anne Arundel* county, gentleman, of the other part. Whereas the above said *James* is seized in fee simple of three several tracts of land, all lying in *Baltimore* county, one called *Todd's Range*, and originally laid out

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for five hundred and ten acres; another called *Mountenay's Neck*, containing two hundred acres, and the third called *Bold Venture*, containing one hundred and sixty acres, all of which said tracts or parcels of land are contiguous one to another. And whereas the said *James* has covenanted with one *John Hurst*, of the said county of *Baltimore*, to convey and make over unto him and his heirs, one hundred and fifty acres out of the said tract called *Mountenay's Neck*, and one hundred acres out of the said tract called *Todd's Range*.

Now this present indenture witnesseth, that the said *James* and *Penelope* his wife, &c., have given, &c., the said *Charles Carroll*, and his heirs, *all that the remaining part of the said tract of land called Mountenay's Neck*, as also all that the remaining part of the said tract called *Todd's Range*, as also all that entire tract called *Bold Venture*, with all, &c. To have and to hold the said remaining part of the said two tracts called *Mountenay's Neck* and *Todd's Range*, as also all that entire tract called *Bold Venture*, with all and singular the appurtenances thereunto belonging, or in any wise appertaining, unto him the said *Charles Carroll*, his heirs and assigns forever, &c.

*JOHN HURST mortgage to RICHARD COLEGATE* of one hundred thirty-five acres and one half part of an acre of land, being part of a certain tract or parcel of land called and known by the name of *Cole Harbour*, lying in the county aforesaid; and also one hundred sixty and four acres and one half part of an acre of land, being part of another tract or parcel of land formerly belonging to one *Alexander Mountenay*, late of the aforesaid county and province, deceased, and purchased by *James Todd* of the aforesaid county, gentleman: Beginning at, &c.

*JOHN HURST conveyance to THOMAS SHERIDINE AND THOMAS SLIGH.* This indenture, made the nineteenth day of March, seventeen hundred and forty-nine, between *John Hurst* of, &c., of the one part, and *Thomas Sheridine* and *Thomas Sligh* of, &c., of the other part, witnesseth, that the said *John Hurst*, for, &c., by these presents hath given, granted, &c., unto them the said *Thomas Sheridine* and *Thomas Sligh*, their



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heirs and assigns, one hundred thirty-five acres of land and one half part of one acre of land, being part of a tract of land called and known by the name of *Cole's Harbour*, lying in the county aforesaid; and also one hundred sixty-four acres and one half part of an acre of land, being part of another tract or parcel of land formerly belonging to one *Alexander Mountenay*, late of the county and province aforesaid, deceased, and purchased by *James Todd* of said county, gentleman: Beginning at, &c.

The will of *Richard Colegate*, dated 8th August 1721, and proved 6th February 1721, devised as follows:

And I also give my said sons *John* and *Thomas*, three hundred acres of land, being part of *Cole's Harbour* and *Mountenay's*, (which land I had of *John Hurst*,) and all the houses, orchards and corn fields to them, or either of the said tracts, belonging, to be equally divided between them and their heirs and assigns forever.

*JOHN COLEGATE AND THOMAS A. COLEGATE conveyance to THOMAS SHERIDINE AND THOMAS SLIGH*, dated 15th Nov. 1750, for the land mentioned in their father's will, in fee.

*THOMAS SHERIDINE to THOMAS SLIGH. To all to whom these presents shall come, greeting:* Whereas, a certain *John Colegate* and *Thomas Colegate* did, by indenture bearing date on or about the fifteenth day of November, in the year one thousand seven hundred and fifty, and made, or mentioned to be made, between the said *John Colegate* and *Thomas Colegate* of the one part, and *Thomas Sheridine's* late father, deceased, a certain *Thomas Sligh* of the other part, for and in consideration of one hundred pounds, sterling money, to them the said *John Colegate* and *Thomas Colegate* in hand paid, at or before the sealing and delivery thereof, grant, &c., unto them the said *Thomas Sheridine* and *Thomas Sligh*, their heirs and assigns forever, all that part of two tracts or parcels of land called *Todd's Range* or *Cole's Harbour* and *Mountenay's Neck*, situate, &c.: Beginning for the part thereby conveyed or mentioned, or intended to be, of the aforesaid tract or parcel of land, at a bounded white oak on a point, being first bounded

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tree of *Cole Harbour*, by the north-west branch, and runs down the river or branch east-south-east, &c. And whereas, my said late father, *Thomas Sheridine*, after being jointly with the aforesaid *Thomas Sligh*, by virtue of the conveyance aforesaid, seized and possessed of the aforesaid piece or parcels of land hereby conveyed, or mentioned so to be thereof, on or about the 29th day of May, 1752, died so seized and possessed, living the aforesaid *Thomas Sligh*, who survived my said late father, and who now continues as survivor, seized, and yet is actually possessed of the aforesaid three hundred acres of land. And whereas, I am eldest son and heir-at-law of the said *Thomas Sheridine*, deceased, for which reason the said *Thomas Sligh* is desirous of having conveyed to him my right or claim which I may have to the said three hundred acres of land, so as aforesaid conveyed. Now know ye, that I, *Thos. Sheridine*, son and heir of the aforesaid *Thomas Sheridine*, deceased, for and in consideration of the sum of fifty pounds, sterling money, by the said *Thomas Sligh* to me in hand paid, have remised, released and forever quit-claim unto him the said *Thomas Sligh*, his heirs and assigns forever, all that the aforesaid three hundred acres of land.

*CHARLES CARROLL* deed to *THOMAS SLIGH*, 150 Acres, part of *Mountenay's Neck and Todd's Range*. This indenture, made the thirty-first day of May, in the year of our Lord one thousand seven hundred and fifty-nine, between *Charles Carroll*, of the city of *Annapolis*, in *Anne Arundel* county, esq., of the one part, and *Thomas Sligh*, of *Baltimore* county, merchant, of the other part, witnesseth; whereas *Charles Carroll, Esq.*, late of the city of *Annapolis* and county of *Anne Arundel* aforesaid, deceased, by his last will and testament in writing, bearing date the 1st day of December 1718, amongst other things therein contained, bequeathed all his lands in *Baltimore* county to his sons *Charles* and *Daniel*, as also all his mortgages, as by the said will, duly proved and recorded, may appear. And the said *Daniel Carroll*, by his last will and testament in writing, bearing date the 12th day of April, 1734, did will and authorise *Charles Carroll*, party to this deed, to

sell all his lands which should not in any one tract exceed five hundred acres, as by the said will and testament duly proved and recorded may appear.

Now this indenture witnesseth, that the said *Charles Carroll*, for, &c., to him in hand paid by the said *Thomas Sligh*, &c., unto him the said *Thomas Sligh*, his heirs and assigns, all the northernmost end of a tract of land called *Mountenay's Neck*, beginning at the end of two hundred and twenty-four perches in the easternmost line of the said land, and running thence north-northeast seventy-six perches; then west-north-west one hundred and forty perches; then south-south-west seventy-six perches; then east-south-east one hundred and forty perches to the beginning. And all that part of *Todd's Range*, except thirteen and a half acres, which he hath already agreed to exchange with the said *Thomas Sligh*, beginning at the end of the south-south-west seventy-six perches course, of part of *Mountenay's Neck* above mentioned, and running thence south-south-west fifty-six perches; then north-west one hundred and forty perches; then east one hundred and forty perches to *Mountenay's Neck*; then to the beginning, containing one hundred and fifty acres, more or less; together with all the rights, profits, benefits, privileges and appurtenances thereunto belonging or in any wise appertaining. To have and to hold unto him the said *Thomas Sligh*, his heirs and assigns forever.

THOMAS SLIGH deed to THOMAS HAMMOND, 14 $\frac{1}{4}$  a. pt. *Mountenay's Neck*. This indenture, made the thirty-first day of January, in the year of our Lord one thousand seven hundred and fifty-nine, between *Thomas Sligh*, of the one part, and *Thomas Hammond*, of, &c., of the other part, witnesseth, that the said *Thomas Sligh*, for, &c., hath given, &c., unto him the said *Thomas Hammond*, his heirs and assigns forever, all that part of a tract or parcel of land called *Mountenay's Neck*, lying, &c., beginning for the part hereby bargained and sold, at a bounded post set up for the beginning boundary of the whole tract called *Mountenay's Neck*, standing near the eastern shore side of the north-west branch of *Patapsco* river, and running thence north-north-east fifty-four perches and fourth part



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of a perch, north forty-seven degrees west, forty-five perches and three-fourths part of a perch, unto *Peter Lettick's* part of said land ; then bounding on said *Lettick's* part, south twenty-one degrees and fifteen minutes, west fifty-seven perches unto the aforesaid north-west branch of the *Patapsco* ; then bounding on the said north-west branch the two following courses, viz : south sixty-eight degrees east, sixteen perches ; south thirty-two degrees east, twenty-two perches and half a perch, until it intersects the first line of the whole tract, and then bounding on that line reverse of the same to the beginning post, containing fourteen acres and one-fourth part of an acre, more or less.

And the plaintiffs further proved that the said *Thomas Hammond* died before the Revolution, leaving *William Hammond* his eldest son and heir at law, and that he inherited all the real estate of his father *Thomas*.

And further offered in evidence two deeds from said *William Hammond* to *John Cornthwaite*, of the 20th December, 1775, and of the 2nd April, 1779 ; two deeds from *John Cornthwaite* to *John Hammond*, of the 24th December, 1779, and of the 7th June, 1780 ; a deed of trust from *John Hammond* to *John Anderson*, of the 4th of March, 1795.

**WILLIAM HAMMOND to JOHN CORNTHWAITE. Conveyance.** This indenture, made this twentieth day of December, seventeen hundred and seventy-five, between *William Hammond*, of, &c., shipwright, of the one part, and *John Cornthwaite*, of the same place, merchant, of the other part, witnesseth, that the said *William Hammond*, for, &c., hath granted, &c., unto him the said *John Cornthwaite*, his heirs and assigns forever, all that piece or parcel of land situate, lying and being in the south-east addition to *Baltimore* town, being part of a tract or parcel of land called *Mountenay's Neck*, and is contained within the following metes and bounds, courses and distances, viz : Beginning for the part hereby bargained and sold at the north-west corner of *Caroline* street and *Wilkes* street, and running thence along *Wilkes* street westerly seventy feet ; thence southerly parallel with *Caroline* street to the out-line of the said tract

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of land called *Mountenay's Neck*; thence running and bounding therewith to *Caroline* street aforesaid; and thence by a straight line to the beginning; together with all, &c.

WILLIAM HAMMOND to JOHN CORNTHWAITE. This indenture, made this second day of April, seventeen hundred and seventy-nine, between *William Hammond*, of, &c., shipwright, of the one part, and *John Cornthwaite*, of the same place, merchant, of the other part. Witnesseth, that the said *William Hammond*, for, &c., hath granted, &c., unto him, the said *John Cornthwaite*, his heirs and assigns forever, all that piece, part or parcel of land, situate, lying and being in the south-east addition to *Baltimore* town, being a part of a tract of land called *Mountenay's Neck*, and is contained within the following metes and bounds, courses and distances, viz: Beginning for the part hereby bargained and sold at the end of seventy feet westerly from the north-west corner of *Caroline* and *Wilkes* street, and running thence along *Wilkes* street, westerly, one hundred feet to *Petticoat* lane; thence running and bounding on *Petticoat* lane, southerly, into the water; thence running and bounding on and with the water, easterly, parallel with *Wilkes* street one hundred feet, to that part of the said land by the aforesaid *William Hammond* heretofore sold to the said *John Cornthwaite*; and then running and bounding therewith by a straight line to the beginning, together with all, &c.

The two deeds from *John Cornthwaite* to *John Hammond*, reconveyed the lots described in the two preceding deeds from *William Hammond* to *John Cornthwaite*.

JOHN HAMMOND to JOHN ANDERSON. Deed. This was a conveyance in trust, dated 4th March, 1795, reciting, amongst other matters: "And whereas, a marriage is intended shortly to be had and solemnized between the said *John Hammond* and a certain *Elizabeth Anderson*, the sister of the above named *John Anderson*, and the said *John Hammond* being desirous of conveying the above described ground in trust for the use of the said *Elizabeth Anderson*, his intended wife, after his decease, and for the other uses hereinafter mentioned, he the said *John Hammond* hath agreed to execute these presents;" and in

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consideration thereof conveyed the legal estate to *John Anderson*, in fee, in trust for the use of *John Hammond*, for life, without impeachment of or for any manner of waste, and also with such power of leasing as is hereinafter contained. “And from and immediately after the decease of the said *John Hammond*, then to the use and behoof of the said *Elizabeth Anderson*, if she shall survive him, and her assigns, for and during the term of her natural life, without impeachment of or for any manner of waste, and also with such power of leasing as is hereinafter contained, and from and immediately after the termination of the said several estates, then to the use of the said *John Anderson* and his heirs during the lives of the said *John Hammond* and *Elizabeth Anderson*, and the life of the survivor of them, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries or bring actions as occasion shall require; but nevertheless to permit and suffer the said *John Hammond* and his assigns during his life, and after his decease the said *Elizabeth Anderson*, (if she shall survive him, and her assigns during her life,) from time to time to receive and take the rents, issues and profits of the said premises to and for his, her and their own use and benefit respectively, and from and immediately after the decease of the survivor of them, the said *John Hammond* and *Elizabeth Anderson*, to the use and behoof of all and every the children of the said *Elizabeth Anderson*, by the said *John Hammond* lawfully to be begotten, to be equally divided between or among them, if more than one share, and share alike, as tenants in common, and not as joint tenants, and to their heirs and assigns forever; but if any of the said children shall not have arrived at the age of twenty-one years at the decease of their said parents, then upon his further trust,” &c.

And the plaintiff also proved that *John Hammond* intermarried with the plaintiff in this case soon after the execution of the said last mentioned deed; that she was the sister of said *John Anderson*; that *John Anderson* died about the year 1805, and *John Hammond* soon after him.



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The plaintiff further offered in evidence the permission to *John Hammond*, of the *Baltimore Port Wardens*, to extend his ground to the south side of *Aliceana* street, dated 11th September, 1784; also the patent of *Todd's Range*, 1st June, 1700, viz :

“At a meeting of the *Baltimore Port Wardens*, *Baltimore*, September 11th, 1784, present, Samuel Purviance, president, John Sterett, Samuel Smith, Thomas Elliot, Richard Ridgely, Thos. Russell, Daniel Bowly, William Patterson, Robert Henderson. The board took into consideration the application of *John Hammond*, and thereupon ordered, that *John Hammond* shall be permitted to extend his wharf in a south direction, parallel with *Caroline* street, to the south side of *Aliceana* street extended, he, the said *John Hammond*, engaging to leave the width of *Aliceana* street open forever hereafter as a public highway.”

And the patent to *James Todd*, for *Todd's Range*, dated 1st June, 1700, for all that tract or parcel of land heretofore called by the name of *Cole's Harbour*, but now called *Todd's Range*, “beginning at a bounded white oak, standing in the line of a parcel of land formerly belonging to *Alexander Mountenay*, and now in the possession of the aforesaid *Todd*, and running west to a bounded red oak standing by a small branch called the *Spring Branch*, then more west seventy-five perches, to a double white oak, in all containing three hundred and twenty perches; then north-northeast, two hundred seventy-five perches to a red oak, being a bound tree of the aforesaid *Mountenay's* land, and then south-southwest with the said *Mountenay's* line to the first bounded tree, containing and now laid out for five hundred and ten acres, more or less, according to the certificate of survey thereof, taken and returned into our land office, bearing date the seventeenth day of February, one thousand six hundred and ninety-eight, and there remaining, together with all the rights, profits, benefits and privileges thereunto belonging, (*Royal Mines* excepted.) To have and to hold, &c.

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The plaintiff also offered a record of a judgment and recovery in ejectment in the Provincial Court, of *Yoakley and Company's* agent, lessee, vs. *John Hurst*, April session, 1705, for "the three hundred acres of land aforesaid, lying in the county aforesaid, and late in the tenure or occupation of *James Todd*, of the aforesaid county, planter, beginning at a bounded white oak on a point, being the first bounded tree of *Cole Harbour*, by the northwest branch, and running down the river or branch, east-southeast, for breadth one hundred and forty perches, to a locust post on a little point, and then with a line drawn north-north-east, with the line of *Moutenay's* land, for length of two hundred twenty-four perches to a bounded white oak, standing in the said line, then with a line drawn west-northwest one hundred and forty perches to a red oak, standing in the north-northeast line of the said land of *Moutenay's*, then running with the said land south-southwest fifty-six perches to a white oak, then with a line drawn northwest two degrees south, for the length of two hundred four perches to a gum tree, standing near the said branch, then with a line drawn south-southwest seventy-five perches to a white oak, standing in the corner of the old field by the falls or branch aforesaid, then with a line drawn southeast and by south to the said branch, and with said branch southeast and by south to the first bounded tree."

And also offered in evidence a certified extract from the debt books, viz :

I hereby certify that in the debt book for *Baltimore* county, for the year 1754, in page 21, there is the following entry, viz :

RENT.

*Thos. Sligh*, Dr. part of *Moutenay's Neck*, 100 acres, £0 4 0

Also in the debt book for said county, for the year 1755, in page 22, is the following entry, viz :

*Thos. Sligh*, Dr. part of *Moutenay's Neck*, 200 acres, £0 8 0

Also in the debt book for said county, for the year 1756, in page 24, is the following entry, viz :

*Thos. Sligh*, Dr. part of *Moutenay's Neck*, 200 acres, £0 8 0

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Also in the debt book for said county, for the year 1757, in page 19, is the following entry :

*Thos. Sligh*, Dr. part of *Moutenay's Neck*, 200 acres, £0 8 0

Also in the debt book for said county, for the year 1758, in page 23, is the following entry :

*Thos. Sligh*, Dr. part of *Moutenay's Neck*, 200 acres, £0 8 0

Also in the debt book for said county, for the year 1759, in page 20, is the following entry :

*Thos. Sligh*, Dr. part of *Moutenay's Neck*, 184 acres, £0 7 4

Part of *Moutenay's Neck* and *Todd's*

Range, 150 acres, - - - 0 6 0

Also in the debt book for said county, for the year 1760, in page 20, is the following entry :

*Thos. Sligh*, Dr. part of *Moutenay's Neck*, 200 acres, £0 8 0

Also in the debt book for said county, for the year 1761, in page 19, is the following entry :

*Thos. Sligh*, Dr. part of *Moutenay's Neck*, 200 acres, £0 8 0

Also in the debt book for said county, for the year 1762, in page 19, is the following entry :

*Thos. Sligh*, Dr. part of *Moutenay's Neck*, 184 acres, £0 7 4

Part of *Moutenay's Neck* and *Todd's*

Range, 150 acres, - - - 0 6 0

Also in the debt book for said county, for the years 1763, 1764, 1765, 1766, 1768, and 1769, in page 19, are the following entries, viz :

*Thos. Sligh*, Dr. part of *Moutenay's Neck*, 184 acres, £0 7 4

Part of *Moutenay's Neck* and *Todd's*

Range, 148 acres, - - - 0 5 11

The plaintiff further proved that some time after the death of the said *John Hammond*, the plaintiff in this case intermarried with a certain *Robert Casey*, who departed this life some time before the impretation of the writ in this case.

The plaintiff further offered in evidence the lease from *John Hammond* to *Thomas McDowal*, dated the 8th February, 1798, for the lot marked No. 10 on the plat.

The plaintiff also offered in evidence the ordinance of the Mayor and City Council, of the 11th March, 1823.



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The plaintiff further, by *Ephraim Smith* and others, offered in evidence the plots and explanations in this case, and proved that the location of the above deeds, patents, record and permission were correctly made thereon ; and proved that *John Hammond*, during his lifetime, filled up and improved a part of his lot on the east side of *Caroline* street, fronting on the water, and in this way, and by a wash that came down *Caroline* street, a bar was made above ordinary high-water mark, which extended in part to the property leased to *McDowal* ; that after this lease *McDowal* continued to fill up his lot until about the year 1800, when he erected a house and enclosed it with a board fence ; that the ground at the time when it was thus enclosed was raised above ordinary high tide, and that it has remained in that condition until the present time ; that *John Hammond*, during his lifetime, and the plaintiff, since his death, have collected the rent of the property leased to *McDowal* ; that the northern blue shaded line, beginning at A, shows correctly where the water ran at ordinary high tides in 1783. And the more southern blue shaded line, beginning at C, show the water line in 1801 ; that the water continued to flow nearly in the same way until the year 1824, with the exception of the improvement and filling up made by *Hammond* and *McDowal*, as above mentioned. That there was a great wash that came down *Caroline* street, crossing the square of the plaintiff from the southeast intersection of *Fleet* and *Caroline* streets, and flowing in a southwesterly direction towards *Spring* street, where it intersects *Aliceana* street ; that the deposits of this wash was very considerable, and the effect of it was to render the water on the upper part of the square of ground above *Aliceana* street much shallower than it was before, so that there was on each side of the wash a mud flat, that was left nearly bare at low tides, but the water was shallower above than it was at *Aliceana* street ; that the wash down *Caroline* street was diverted in an easterly direction from the cove in 1808, when the deposit was stopped ; that along the north side of *Lancaster* street there was filling up by the city before any was done north of it, and that along that line

there were considerable deposits of earth made at places, the water running in the intervals between them; that this was four or five years before the city began to fill up above; that along *Harford* run there was a good deal of deposits by alluvion at that period, so that *Harford* run could not be passed through except by tunnels; that *John Hammond* was in possession of the property from *Wilkes* to *Fleet* streets, and filled it up east and west of *Caroline* street, and collected the rents from *McDowal's* house, and *Mrs. Casey* since his death; that *McDowal* built a house about the year 1800, a year or two after he got his lease, on the ground marked on the plat leased by him from *Hammond*; and further, on cross examination, proved that *William Inloes'* fence could not be seen from *Wilkes* street; that the logs of the fence did not join *Inloes'* ground, but commenced rather eastwardly of *Caroline* street, and by said *Smith*; that the old people used to laugh at *Inloes* for putting it up; that one *Spencer* had a fence extended from a point west of *Spring* street towards *Canal* street; that *Spencer's* fence and *Inloes'* did not join, and that *Inloes'* fence did not go as far as *Spring* street.

And the plaintiff further offered evidence by *James W. Collins*, that he was City Commissioner and Port Warden in the year 1823; that in that year the whole north line of *Lancaster* street from *Canal* street east to west side of *Caroline* street, had been for some time logged; that along the line there are deposits of earth thrown there by the mud machines, and that the mud running over had gone toward filling up the ground immediately north of the north line of *Lancaster* street, and to fill up at the east side of *Caroline* street very little ground showed, except at the corner of *Canal* street; that there was an opening at *Caroline* and *Lancaster* streets, through which scows went; that from *Lancaster* street northerly, above *Aliciana* street, (with the exception of the ground projecting as marked on the plat as *Inloes'* ground, near the corner of *Aliciana* street and *Strawberry* alley,) the water ran in 1823 along the eastern side of *Strawberry* alley, and was deep there, and that the water covered the ground (except where there were

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the deposits aforesaid, which did not extend to *Aliceana* st.) northerly from *Lancaster* street beyond *Aliceana* and westerly of *Strawberry* alley; that he left the work of filling up in 1829; that the ground had been thrown over the north side of *Lancaster* street, but had not in 1829 filled up as far as *Aliceana* street; that he saw nothing of *William Inloes'* fence in 1823.

And the plaintiff further proved by *William Davy*, that he married in the family of *Thomas Hammond*, having married the daughter of *William Hammond*, who was the eldest son of *Thomas*; that *Thomas* died before the revolution, and that *William*, as the eldest son, inherited his estate under the *English* law; that *Thomas Hammond* had two sons, was a sea captain, and died in *Boston*; that he lives at the corner of *Bond* and *Wilkes* street, and has lived there many years, and knows how the water ran in 1819; that *Caroline* street was lower than *Strawberry* alley, and the water would run through it high up; that the filling up along *Aliceana* street and *Caroline* street, was completed four or five years ago in a proper state for passing from *Fleet* street down to *Aliceana* street. Six or seven years ago the ground from *Lancaster* to *Aliceana* street was not yet filled up; that the fence of *William Inloes* was put up between 1808 and 1812; that the water at high tide ran over it, and the tide was enough to break it down with ice, and that it broke away at times and was kept up by repairs seven or eight years; and that he does not know that it remained until the city filled up; that it was before the war that he saw it last renewed; that it was a trifling affair to stop the mud; that boats could, in a smart tide, go over it; that it extended westerly about two or three hundred feet, but not west of *Spring* street; that it was made of stakes driven down into the mud seven or eight inches wide and about an inch thick; that the stakes did not go up to the land, and that between them and the land there were logs which went about half a square, and about sixty feet out; that there was no wash where the logs were; that the wash ran down *Caroline* street to *Inloes'* said fence, and was by it turned westerly of the fence; that he saw *Inloes* repairing his fence two or three times; that



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*Inloes* said he wanted to go to *Eden* street to fill up his lot; that witness built houses for *Inloes* on *Aliceana* street, west of *Strawberry* alley; that he knew *Joshua Inloes'* wharf; that the water was deep at its north and south sides, and that vessels could come up to it, carrying seven or eight feet depth of water; that *William Hammond* died in 1783 or 1784; that before he died he had sold nearly all his property; that he left a son *Thomas* and three daughters, and that this *Thomas* died, while a boy, in the year 1797.

The plaintiff further offered proof by *Joseph Owens*, that in the year 1819 he was appointed City Commissioner and Port Warden, and so continued until 1825; that in 1823 the water flowed to the eastern side of *Strawberry* alley, above *Aliceana* street and from *Lancaster* street, and was deep there; that he acted as City Commissioner under the ordinance of 1823 for filling up the cove, and under the ordinance contracted with parties for filling up to the extent as required according to the ordinance by the Commissioner of Health, the limits for the filling up were (as shown by witness on a plat, now exhibited, made by the city,) along the eastern side of *Strawberry* alley, extending northerly, but not as far westerly as between *Caroline* and *Spring* streets. Cross examined, he says, that the owners of ground south of *William Inloes'* lot entered into contracts under the ordinance for filling up; that he does not remember that any improvements or filling up was, under the ordinance of 1823, directed by the Board of Health to be made in front of the grounds on *Wilkes* street; that he does not remember calling on *Mrs. Casey* as an owner of ground on *Wilkes* street, nor on what owners there he called; that the depositing of mud could have been seen from *Wilkes* street; that no notice was given by any one owning lots on *Wilkes* street, not to go on with the filling up.

The defendants, to prove the issue on their part, offered in evidence the following patents, deeds and other papers, to wit:

The escheat patent of *Mountenay's Neck*, dated 7th July, 1737.

The patent of *Island Point* to said *Fell*, dated 15th June, 1734.

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The will of *William Fell*, (the elder,) dated 12th January, 1746.

Deed of *Edward Fell* to *Thomas Sligh*, dated 19th August, 1758; also, deed from *Samuel Wheeler and wife* to *David Jones*, 22nd March, 1685.

The patent of *Bold Venture*, dated 20th March, 1695.

The escheat certificate of *Moutenay's Neck*, dated 14th April, 1737.

The patent of *Long Island Point*, dated 10th July, 1671.

The certificate of *Fell's Prospect* to *Edward Fell*, dated 20th May, 1761.

The following is a copy of the patent of *Moutenay's Neck* in the case of *Rogers, et al, lessee vs. Moore* :

WILLIAM FELL'S PATENT—200 ACRES MOUNTENAY'S NECK. *Charles, &c.* Know ye, that whereas *William Fell*, of *Baltimore* county, by his petition to our agents for management of land affairs within this province, did heretofore set forth that there was escheat unto us a certain tract or parcel of land, called *Moutenay's Neck*, lying and being in the county aforesaid, originally, on the 30th day of June, 1663, granted unto a certain *Alexander Moutenay*, for two hundred acres under old rent; that afterwards, on the 22nd of March 1685, a certain *Samuel Wheeler and Ann*, his wife, by their indenture of bargain and sale, conveyed the said land to a certain *David Jones*, who died thereof possessed, intestate, and without heirs, by which means, or for want of heirs of the said *Alexander Moutenay*, or regular conveyances from the first taker up, the same is become escheat unto us as aforesaid, and the petitioner being the first discoverer thereof, humbly prayed to be admitted to its purchase, be the same escheat by the means aforesaid, or by any other ways or means whatsoever, and, &c.

We do therefore, in consideration thereof, and other the premises, hereby give, grant and confirm unto him the said *William Fell*, all that the aforesaid tract or parcel of escheat land, now resurveyed, and called *Moutenay's Neck*, lying and being in the county aforesaid: Beginning at a bounded white oak standing on the north side of the north-west branch

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of *Patapsco* river, and near the mouth of a small branch descending into the north-west branch, which tree was bounded by commissioners appointed to examine evidences concerning the bounds of the same tract of land, at the place where the original beginning tree did stand, and running thence up the said north-west branch and over the mouth of a cove west-north-west one hundred perches to a bounded red oak, at or near the place whereat the second bounded tree did stand, thence north-north-east three hundred and twenty perches, east-south-east one hundred perches, and thence south-south-west (as expressed in the grant,) unto the beginning, containing and laid out for two hundred acres, more or less, according to the certificate of resurvey thereof, taken and returned into our land office, bearing date the 27th day of April, 1737, and there remaining, together with, &c.

WILLIAM FELL—PATENT—85 ACRES—ISLAND POINT. *Charles, &c.* Know ye, that whereas *Carroll*, of the city of *Annapolis*, in *Anne Arundel* county, *Chirurgion*, by his humble petition to our agent for management of land affairs within the province, did heretofore set forth that a certain *William Poultney*, of *Baltimore* county, died, was possessed of a tract of land called *Island Point*, situate on a branch of *Patapsco* river, granted unto the said *Poultney* for one hundred acres, by patent bearing date the 10th day of July, Anno Domini 1671, and died thereof possessed Anno Domini 1674, and although an alien, made a will and devised the same to *Edward Monfrett*, likewise an alien, in the words: “*Item.* I give and bequeath unto *Edward Monfrett*, of *Patapsco*, all my lands, goods and chattels;” whereby the said *Monfrett*, as the petitioner conceived, had but an estate for life, although, that he the said *Poultney* was capable of devising the said land, and that after the decease of the said *Monfrett*, the said land would come to the heirs of the said *Poultney*; but so it was, that no heirs of the said *Poultney* or *Monfrett* had since appeared to claim the said land, by means whereof, or some other the causes before set forth, the petitioner conceived the same become escheat unto us as aforesaid, and inasmuch as the petitioner had been



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the first discoverer, prayed to be admitted to its purchase, and &c. In pursuance whereof, it is certified into our land office, that the said tract is resurveyed, by which it appears that the whole now contains the quantity of eighty-five acres, whereof fourteen acres is vacant land added, for which said escheat and vacancy the said *Charles Carroll* has, according to our instructions to *Edmund Jenings, esq.*, our present judge of our land office, bearing date at *Annapolis* the 14th of June 1733, paid and satisfied unto *Daniel Dulany, esquire*, our present agent and receiver general, for our use, as well the sum of seven pounds sterling, being one-third part of the value set on the said escheat, as also the sum of six shillings sterling, for the rights to the vacancy added; but before our grant thereon to him did issue, he the said *Charles Carroll* did, on the 4th of June 1734, for a valuable consideration, assign, sell, transfer and make over unto *William Fell*, of *Baltimore*, his heirs and assigns forever, all his right, title and interest, of, in and to the said land and the certificate thereof, who has supplicated us that our letters patent of confirmation may now issue unto him, which we have thought fit to condescend unto. And we do, in consideration thereof and other the premises, hereby give, grant and confirm unto him the said *William Fell*, all that the aforesaid tract or parcel of escheat land, with its vacancy added, now resurveyed, and still called *Island Point*, lying and being in *Baltimore* county: Beginning, &c.

The last will of *William Fell*, dated 12th January 1746, devised as follows:

In some good degree of the fear of Almighty God, it seemeth good to me, *William Fell*, of *Baltimore* county in the province of *Maryland*, to make and declare this to be my last will and testament, relating to those things it hath pleased God to bless me with in this world, in manner and form, following: *First.* My will and desire is that all those debts, &c.

*Item.* I give and bequeath unto my son *Edward Fell*, three tracts of land, called *Long Island Point*, *Cole Harbour* and *Trynkeltfield*; also, all the south part of a tract of land called *Moutenay's Neck*, as shall be found lying on the south side

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of the main road now lying through the said tract, &c.; also, I give and bequeath unto my daughter *Catharine* the remaining north part of my tract of land already mentioned by name of *Mountenay's Neck*, lying on the north side of the main road aforesaid, and, &c.

EDWARD FELL to THOMAS SLIGH, 200 Acres *Mountenay's Neck*. By indenture dated 17th August 1758, conveyed all his, the said *Edward Fell*, his right, title, interest, property, claim and demand, as well in equity as in law, of, in and to all that tract or parcel of land and premises, lying and being in the county aforesaid, on the north-west branch of *Patapsco*, called *Montany's Neck*, containing two hundred acres, more or less. To have and to hold the said bargained tract or parcel of land and premises, with the appurtenances, and every part and parcel thereof, unto him the said *Thomas Sligh*, his heirs and assigns forever, and to his and their only proper use and behoof.

SAMUEL WHEELER AND WIFE to DAVID JONES. *Know all men by these presents*, that I, *Samuel Wheeler*, and *Ann Wheeler*, my wife, for divers good causes and considerations hereunto moving, have made, constituted and appointed, and do, by these presents, ordain, constitute and appoint my well-beloved friend, *Thomas Lightfoot*, for me and in my stead, to transfer, convey and make over unto *David Jones*, of *Baltimore* county, all that parcel of land called *Mountenay's Neck*, being two hundred acres of land, lying upon the north-west branch of *Patapsco* river, and we, the said *Samuel* and *Ann*, do hereby ratify and confirm and allow what our said attorney shall act or do in the premises, to be of as much strength and power in law as we ourselves were then and there present. Witness our hands and seals this 1686.

SAMUEL WHEELER, (Seal.)

ANN WHEELER, (Seal.)

Signed, sealed and delivered in the presence of us, *Edward Batson*, *William Baroll*.

June 1st, 1686. In open court in *Baltimore* county, *Mr. Thomas Lightfoot* came and acknowledged himself to be the

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attorney of *Samuel Wheeler* and his wife, for the making over a parcel of land unto the within mentioned *David Jones*, called *Moutenay's Neck*.

*Memorandum.* That the blank in the above power of attorney was left in the original record.

Certified—per, ROGER MATTHEWS, *Transcriber*.

Transcribed from liber C, No. 1, folio 189.

This indenture, made the twenty-second of March, in the year of our Lord God everlasting, one thousand six hundred and eighty-five, between *Samuel Wheeler* and *Ann Wheeler*, of *Cecil* county, his wife, in the province of *Maryland*, gentleman, of the one part, and *David Jones*, of *Baltimore* county, of the aforesaid province, gentleman, of the other part, witnesseth, that the said *Samuel Wheeler* and *Ann Wheeler*, his wife, for a valuable consideration already in hand received, have bargained, sold and made over, and do, by these presents, absolutely bargain, &c., from me, my heirs and assigns, unto the aforesaid *David Jones*, his heirs and assigns, all that tract or parcel of land called *Moutenay's Neck*, lying in *Baltimore* county and upon the north side of *Patapsco* river, and upon the north side of the north-west branch of the said river: Beginning at a marked red oak by a little branch, and running up to the north-west branch west-north-west one hundred perches, over a cove into a marked white oak standing on a point, then running north-north-east into the woods three hundred and twenty perches, then running east-south-east one hundred perches, then running south-south-west to the first tree, for two hundred acres of land, more or less. Together with all the estate, right, title, interest, claim and demand whatsoever, of him the said *Samuel Wheeler* or *Ann Wheeler*, his wife, their heirs, executors or administrators. To have and to hold, &c.

This conveyance of land, with the appurtenances thereof, was acknowledged and made over by *Thomas Lightfoot*, the attorney of *Samuel Wheeler* and *Ann Wheeler*, unto *David Jones*, and was then and there acknowledged to be their act



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and deed, before us, this 1st day of June, 1686, in open court in *Baltimore* county.

Signed, per order,

THOMAS HEDGE, *Cl'k Balt. Co.*

Transcribed from liber C, No. 1, folio 290, 300, 301 and 302.

JOHN OULTON'S PATENT, 161 *Acres*—*Bold Venture*. Charles, &c. To all, &c: Know ye, that for and in consideration that *John Oulton*, of *Baltimore* county, in our said province of *Maryland*, hath due unto him one hundred sixty-one acres of land within our said province, being due unto him by virtue of a warrant for five hundred acres, granted him the 26th November 1695, as appears in our land office, and upon such conditions and terms as are expressed in our conditions of plantations of our said province, bearing date the 5th day of April, 1684, and remaining upon record in our said province of *Maryland*. We do hereby grant unto him the said *John Oulton*, his heirs and assigns, all that tract or parcel of land called *Bold Venture*, lying on the north side of *Patapsco* river, and on the north side of *Whetstone* branch: Beginning at a bounded white oak, standing by the branch side, it being a bound tree of *Pountny's Point*, and running thence north-north-east fifty-eight perches to a bounded red oak of *Mountenay's*, then with *Mountenay's* land west-north-west one hundred perches to a bounded white oak of *Mountenay's*, then with *Mountenay's* long line north-north-east three hundred twenty perches, then west-north-west fifty-four perches, then south-south-west three hundred twenty perches to a bounded ash, then south-south-west two degrees southerly twenty-four perches to the river side, then down the river south-south-east two degrees easterly eleven perches, then south-south-west two degrees southerly twenty-four perches, then with a direct line to the first tree, containing, and now laid out for one hundred sixty-one acres of land, more or less, according to the certificate of survey thereof, taken and returned into our land office, bearing date the 23rd December 1695, and there remaining, together, &c. To have and to hold the same unto the said *John Oulton*, his heirs and assigns forever, &c.

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*April 14th, 1737.* Whereas *William Fell*, of *Baltimore* county, by his petition to his lordship's agent for management of land affairs within this province, has set forth that there is escheat unto his lordship a certain tract or parcel of land called *Moutenay's Neck*, lying and being in the county aforesaid, originally, on the 30th day of June, 1663, granted unto a certain *Alexander Moutenay*, for the quantity of 200 acres, under old rent; that afterwards, on the 22nd March 1685, a certain *Samuel Wheeler* and *Ann*, his wife, by their indenture of bargain and sale, conveyed the said land to a certain *David Jones*, who died thereof possessed, intestate, and without heirs, by which means, or for want of heirs of the said *Alexander Moutenay*, or regular conveyances from him as first taker up, the same is become escheat to his lordship as aforesaid; and the petitioner being the first discoverer thereof, humbly prayed to be admitted to its purchase, be the same escheat by the means aforesaid, or by any other ways and means whatsoever, and a special warrant to resurvey the same, with liberty of adding any vacant land that can be found thereto contiguous, &c.; that upon return of a certificate of such resurvey, he paying his lordship's agent such reasonable price as shall be agreed upon for the purchase of said escheat, and making good rights to the vacancy added, might have his lordship's letters patent of confirmation issue unto him thereon, which is granted him, provided he complies with all requisites, and finally sues out such grant within two years from the date hereof. Lay out, therefore, and carefully resurvey for and in the name of him the said *William Fell*, the aforesaid tract or parcel of escheat land called *Moutenay's Neck*, according to its ancient metes and bounds, and by your outlines adding any vacant land you can find thereto contiguous, whether cultivated or otherwise, not running your lines, &c. In testimony, &c.

LAND OFFICE, *Annapolis*, 24th Oct. 1842.

*Dear Sir*,—Yours of the 22nd inst. I have just received. Herewith I hand you a copy of the warrant of escheat obtained by *William Fell* in 1737, upon *Moutenay's Neck*. There is no petition to be found, either on record or on file, in this office.

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The warrant sets forth that *William Fell*, by his petition to his lordship's agent, &c.; but this appears to be the form of all the warrants issued under the proprietary government without any petition being filed. If a petition had been filed, it would of course have been recorded with the warrant, and made a part of the record. Applications for warrants, I presume, were frequently made under the proprietary government in person and not in writing, as is also the case under the State Government. I have never been able to find any petition for a warrant, either on file or of record, in this office, and have therefore concluded that none were ever filed. Under the State Government, when application is made for a warrant of escheat, we insert in the warrant such description of the land as is furnished us by the party applying for the warrant, the want of due precision being at his risk. I can send you nothing more than a copy of the warrant. (In haste.) Yours, very respectfully,

*William F. Giles, Esq.*

G. G. BREWER.

WILLIAM POULTNEY, *Patent 100 Acres—Long Island Point. Cæcilius, &c.* Know ye, that we, for and in consideration that *William Poultney*, of the county of *Baltimore*, in our said province of *Maryland*, planter, hath due unto him one hundred acres of land within our said province, by assignment from *Robert Wilson*, the assignee of *Capt. Thomas Beason*, due the said *Beason* for transporting *John Greene* and *Sarah Sandstead* into the said province, to inhabit, as appears upon record. And upon such conditions and terms as are expressed in our conditions of plantation, &c., do hereby grant unto him the said *William Poultney* all that parcel of land called *Long Island Point*, lying in *Baltimore* county, on the north side of *Patapsco* river, and on the north-west branch of the river: Beginning at a bounded locust standing at the head of a round bay, and running down the said bay south-south-west eighty perches to a bounded *Spanish* oak at the mouth of said bay, and from the said oak up the said branch north-west thirty-six perches, then west-south-west one hundred perches, then west-north-west seventy-two perches to the bottom of *Long Island Point*, then north-east sixteen perches, then east and by south sixty



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perches, then north and by east eighty perches to a bounded red oak of a parcel of land laid out for *Alexander Mountenay*, then north-north-east by *Mountenay's* land seventy-six perches, and then to the first bounded tree, containing, and now laid out for one hundred acres of land, more or less, together, &c., in fee, dated 10th July, 1671.

MR. EDWARD FELL'S CERTIFICATE—*Fell's Prospect*, 343 Acres—Patented the 20th May 1761. Rent per annum £13 9s sterling, charged to the Rent Roll.

BALTIMORE COUNTY, *Sct*: By virtue of a special warrant, granted out of his lordship's land office, bearing date by renewalment, October 23rd, Anno Domini 1760, to lay out and resurvey for *Edward Fell*, of *Baltimore* county, the following tracts or parcels of land, viz: *Long Island Point*, lying and being in *Baltimore* county, originally, on the 23rd of October 1670, granted unto a certain *William Poultney*, for one hundred acres, under new rent; *Copius Harbour*, originally, on the 10th day of August, Anno Domini 1684, granted unto a certain *John Copius*, for one hundred acres, under new rent; *Carter's Delight*, originally, on the 10th day of December, Anno Domini 1717, granted *John Carter*, for one hundred acres, under new rent; and *Trinket Field*, originally, on the 18th day of August, Anno Domini 1736, granted unto *William Fell*, father of the aforesaid *Edward Fell*, for eighteen acres, under new rent, to be laid out according to their ancient metes and bounds. Nevertheless, correcting and amending any errors in the original surveys, and by my outlines adding any vacant lands I could find thereto contiguous, whether cultivated or otherwise, &c. I, *William Smith*, deputy surveyor of *Baltimore* county, have carefully resurveyed for and in the name of him the aforesaid *Edward Fell*, the aforesaid tracts or parcels of land, according to their ancient metes and bounds: Beginning, for *Long Island Point*, at a bounded white oak standing at the head of a round bay on the north-west branch of *Patapsco* river, and at or near the spot where stood a bounded locust, the original bounded tree, and running thence down the said bay, south-south-west eighty perches, thence north-west thirty-six perch-

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es, west-south-west one hundred perches, west-north-west seventy-two perches, north-east sixteen perches, east by south sixty perches, north by east eighty perches, to a bounded red oak, of a tract of land called *Mountenay's Neck*; then north-north-east by *Mountenay's* seventy-six perches, then with a straight line to the beginning, containing, and laid out for one hundred acres, more or less; and for the resurvey made by *William Fell* on the aforesaid tract or parcel of land, bearing date the 5th day of June, 1734, as by patent: Beginning at the aforesaid bounded white oak standing at the head of a round bay on the north-west branch of *Patapsco* river, and running thence south four degrees west sixty-six perches, south sixty-three degrees west fourteen perches, north forty degrees west thirty perches, north eighty-seven degrees west forty-two perches, south fifty degrees west fifty-six perches, south seventy-three degrees west twenty-four perches, north fifty-five degrees west fifty-four perches, north forty-five degrees east sixteen perches, south eighty degrees east sixty-four perches, north three degrees east eighty perches, north-north-east seventy-six perches, thence with a straight line to the beginning, containing, and now laid out for eighty-five acres. *Copius Harbour*: Beginning at a bounded red oak, being a bounded tree of *Kemp's Addition*, and running from thence north-west thirteen perches to a bounded water oak standing near the said branch, then running west and by south thirty-two perches to a bounded locust of *Long Island Point*, then running north fifty degrees forty-five minutes west one hundred and thirty perches to a bounded red oak, thence north-east one hundred and fifty-six perches, then south-east by south ninety-six perches, bounding on *Kemp's Addition*, thence with a straight line to the beginning, containing, and laid out for one hundred acres. *Carter's Delight*: Beginning at a bounded red oak standing in or near the given line of *Mountenay's Neck*, and running thence north sixty perches, north seventy-eight degrees east one hundred and thirty perches, south eighty-seven degrees east fifty perches, south fifty-nine degrees east sixty-eight perches, south forty-two perches, north sixty-

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four degrees west eighty-six perches, south eighteen degrees west twenty-four perches, south thirty degrees west twenty-two perches, south thirty-six degrees thirty minutes west twenty-six perches, thence with a straight line to the beginning, containing, and laid out for one hundred acres, more or less. *Trinkett's Fields*: Beginning at a red oak bounded with twenty-four notches, a bounded tree of *Copius Harbour*, and running thence north-north-east one hundred and twenty-three perches, south-east by south forty-seven perches, thence with a straight line to the beginning, containing, and laid out for eighteen acres, more or less, which said tracts or parcels of land contains in the whole three hundred and three acres; thirty-three acres, part thereof, is taken away by elder surveys and lost in navigable water, which I have excluded. I have also added to the residue of the said tracts seventy acres of vacant land, and three acres of escheat, as part of *Long Island Point*, not heretofore escheated, and liberty now given to escheat the same, and have reduced the whole into one entire tract, bounded as follows, viz: lying in *Baltimore* county: Beginning at a bounded white oak standing at the head of a round bay on the north side of the north-west branch of *Patapsco* river, being the same bounded white oak expressed in the former grant to be the beginning of *Long Island Point*, and running thence bounding on the said round bay the six following courses, viz: south twelve degrees west ten perches, south twenty-three degrees east six perches, south eleven degrees west twenty-six perches, south ten degrees east twelve and a half perches, south fifteen degrees west fourteen and a half perches, south fifty-three degrees west six and a half perches, to the bottom of the round bay; then running and bounding on and up the said river the nine following courses, viz: north seventy-six degrees west seven perches, north thirty-six degrees west twenty-two perches, north sixty-five degrees west sixteen perches, west twenty-six perches, south fifty-eight degrees west thirty-eight perches, south forty-six degrees west thirty perches, south eighty-eight degrees west twenty-six perches, north sixty-one degrees west thirty-four perches, north



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thirty-six degrees west nine perches, to the bottom of *Long Island Point*, as expressed in the original grant ; then running and bounding with the river the ten following courses, viz : north thirty-eight degrees east eight perches, north fifty-eight degrees east seven perches, south sixty-eight degrees east twenty perches, south eighty-six degrees east twenty-eight perches, south seventy-seven degrees east ten perches, north twenty-five degrees east eighteen perches, north eight degrees east ten and a half perches, north nineteen degrees west fourteen and a half perches, north eight degrees east twenty-eight perches, north thirty-three degrees west sixteen and a half perches to the first line of *Mountenay's Neck*, and running with the said line reversely south sixty-seven degrees and thirty-minutes east eight perches to a post, the beginning of *Mountenay's Neck*, then running and bounding reversely with his given line, north seventeen degrees east two hundred and thirty-eight perches to the beginning tree of *Carter's Delight*, still running and bounding on *Mountenay's Neck*, north seventeen degrees east sixty-seven perches, until it intersects the second line of *Carter's Delight*, then running and bounding with the said line north seventy-eight degrees east one hundred and eleven perches to the end of the said line, still bounding on the said land south eighty-seven degrees east fifty perches, south fifty-nine degrees east sixty-eight perches, south forty-two perches, north sixty-four degrees west eighty-six perches, south eighteen degrees west twenty-seven perches, until it intersects the sixth line of *Kemp's Addition*, then bounding with the said land reversely west-north-west thirty-six perches to the end of the fifth line of the said land ; then running and bounding with the land aforesaid, the five following courses, viz : south by west twenty-four perches, south-west by south eighty perches, south-east by south eighty perches, south by west one hundred and twenty perches, south-east thirty-two perches to the beginning tree of *Kemp's Addition* and the second tree of *Parker's Haven* ; then bounding on *Parker's Haven* reversely the two following courses, viz : east-south-east seventy perches, north by east two hundred and sixty-five

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perches until it intersects the seventh line of *Kemp's Addition*, then running south thirty-seven degrees east thirty perches to a creek called *Harris' creek*; then running down and bounding on the said creek the fifteen following courses, viz: south eleven degrees west fifty-one perches, south fifty-five degrees west sixteen perches, south twelve degrees west sixty-one perches, south fifty-four degrees east six perches, south nineteen degrees west four perches, south sixty-nine degrees west six perches, south ten perches, south thirty-six degrees east fourteen perches, south thirty-two degrees west eighteen perches, south sixty-three degrees west four perches, south fifteen degrees west sixteen perches, south four degrees west thirty-eight perches, south twenty-two degrees west twelve perches, south thirty-six degrees west fourteen perches, south sixty-four degrees west nine perches, to the mouth of the said creek; then running and bounding with the river the five following courses, viz: north eighty-two degrees west forty-six perches, north sixty degrees west sixteen perches, north thirty-three degrees west seventeen perches, north fifty degrees west twenty-four perches, north twenty-three degrees west sixteen perches, then with a straight line to the beginning, containing, and laid out for three hundred and forty-three acres of land, more or less, to be held of the manor of *Baltimore*, by the name of *Fell's Prospect*. Resurveyed March the 10th, 1761.

WM. SMITH, *D. S., B. County*.

*May 12th*, 1761. The certificate and plot disagree in the direction of the fifty-fifth course, disallowed.

U. SCOTT, *Exam'r*.

*May*, 20th, 1761. Examined and passed.

U. SCOTT, *Exam'r*.

On the back of which certificate was the following receipt, viz:

I have received the sum of three pounds thirteen shillings for the within vacancy, and eleven shillings and six pence for the three acres escheat. Patent may therefore issue with his Excellency's approbation,

EDW'D LLOYD.

20th *May*, 1761. Approved,

H. SHARPE.

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The defendants then offered in evidence leases for terms of years from *Ann Fell* to *Abraham Inloes*, dated 17th Feb. 1768; from same to *Geo. Fletcher*, dated 3rd Nov. 1768; to same 15th April 1768; to *William Scarff*, dated 27th May 1768; to *William Rowles*, dated 16th September 1769, for the lots 5, 6, 7, 8, 9, on *Bond street*.

And also gave in evidence that each of said papers was truly located by them on the plats in this case; and also proved that said *Inloes*, and the other defendants, and those under whom they claimed, have been in possession of said lots on *Bond street*, claiming title to the same, upwards of thirty years before the institution of this suit. And then proved that *William Inloes* became entitled, as heir of *Abraham Inloes*, to the ground marked on the plat by the No. 5.

And the defendants then further offered in evidence the following ordinances of the Mayor and City Council of Baltimore, to wit: Of 4th May, 1801; 24th March, 1813; 25th March, 1814; 28th May, 1814; 11th March, 1823; 13th April, 1826.

And the following acts of Assembly, to wit: Of 1783, ch. 24, sec. 9; 1796, ch. 68; 1745, ch. 9.

And then the defendants read in evidence the following receipts of payment of taxes to the city of Baltimore, and for filling up for the ground in dispute in this case—(all which are omitted as not material to this report.)

*City Commissioners' Office, Baltimore, 27th June, 1838.* I hereby certify that the following named persons, viz. William Inloes, J. S. Inloes, Godfrey Meyer, James Hooper, A. B. Harrison, George Chapman, and J. L. Chapman, have paid the amount charged them respectively for filling up a square of ground situated between *Caroline* and *Canal* streets, and *Aliciana* and *Lancaster* streets.

By order, R. B. VARDEN, *Clk*, C. C.

The defendants then further to prove the issue on their part, offered evidence, by — *Graves*, that he has resided forty-seven or forty-eight years on *Fell's Point*, and has that long known the property now in dispute; that *William Inloes'* fence was



put down in 1807 or 1808, and continued, he thinks, nine or ten years; that it began at about the middle of *Caroline* street, and went westerly, he would not say as far as *Spring* street; that a great deal of wash at that time come down *Caroline* street; that the wash went against the fence of *Inloes* afore-said, and was turned by it westerly of the fence; that the wash southerly of *Fleet* street spread, the ground being flat; that the fence was made for filling up, and that was known in the neighborhood, and that it had the effect of filling up by catching the sediment as it came down; that persons looking could see the fence from *Wilkes* street; that he cannot say it was standing when the city began filling up; that the fence was of inch board, nailed to the log; that persons owning the ground on *Bond* street claimed water rights, and that therefore *Inloes* ran out; that he knew *Joshua Inloes'* wharf; that *Joshua Inloes* married his sister, and that he was apprentice to *Joshua Inloes*; that the wharf was up in 1795, and extended fifteen or twenty feet westerly of *Strawberry* alley; that *Joshua Inloes* had a fence from his wharf; that *William Inloes'* fence began about the middle of *Caroline* street; that he saw *Inloes* six or seven times repair it in that number of years; that it continued eight or nine years; that he thinks he saw it since 1814, but will not speak positively; that the wash which went down *Caroline* str't, was turned eastwardly into *Ann* street about the year 1808, but that still some wash came down until a few years past; that the fence caught some of the wash; that before the fence was put there, there was no ground at the place, and afterwards there was, both on the north and south side of the fence; that the muddy water would go through the fence; that at low tides the fence was bare; that when the fence was put up it was about three feet above the ground; that when witness last saw it, it was eighteen inches above the ground at low tides; that *Chapman*, in 1826 or 1827, built the warehouse marked on the plat.

And the defendants further offered evidence, by *Peter Foy*, that he was a member of the Board of Health from the year 1818 to the year 1825; that the filling up of the cove was not

completed till last year ; that in 1814 or 1815 a part of the filling on *Lancaster* street was completed ; that the square in dispute has been enclosed six or seven years ; that *Chapman's* glass house was built in 1826 or 1827 ; that eighteen months or two years afterwards the water was expelled from the square by the discharge from the mud machines, and then water was let in and run over the sediment so as to spread it, which was done by the city authorities ; that witness went with the city commissioners, under the ordinance of 1823, to owners of ground on *Bond* street, for making contracts under the ordinances, but that he does not remember to whom he went, and all asked signed but *Inloes*, but he said it was not a nuisance, for his lot did not want it ; that *Joshua Inloes'* wharf stood about 1794, 1795, or 1796 ; that it ran out fifty or sixty feet westerly of *Strawberry* alley ; that he saw *William Inloes* put a fence, or some contrivance, about 1808 or 1809, in the rear of his (*Inloes'*) lot, to catch the sediment, or that the fence was made by driving down stakes of one or one and a quarter inch stuff into logs or scantling, or something ; that the stakes were there a number of years ; saw some of them in 1823 ; that the tops of them contributed to impede the course of the sediment north and south of *Aliceana* street ; the ground was bare at low tides ; common tides covered it, and ten or twelve years ago the water flowed over the ground above *Aliceana* street ; the ground is considerably lower than the beds of the streets ; *Inloes* has been claiming title to the ground as it made, and claimed as owner of the lot under his father, and to be entitled to follow the water ; the wash down *Caroline* street was over flat ground after leaving *Fleet* street, and then spread ; that he does not know whether the fence was kept up in 1813 or 1814 ; that he passed often where he might have seen it if he had looked ; that any person could have seen it from *Wilkes* street ; does not recollect taking notice of it.

The defendants further offered evidence, by *Walter Frazier*, that he began to work on the mud machine in 1818, and continued till 1841 ; that in 1818 the mud was depositing on *Lancaster* street, and that up *Harford* street, for a distance,

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there was firm land ; that at that time the tide went up back of *William Inloes'* ground, and that a gap for boats was left in *Spring* street, at *Lancaster* street ; that he saw *Inloes'* fence in 1818 and in 1825 or 1826, the last year of the filling up, and that in 1825 there was firm land along it on *Inloes'* lot. It was made of stakes driven down, and could have been seen from *Wilkes* street by any person looking at it ; has seen *Inloes* repairing the fence somewhere about *Caroline* street ; that *William Inloes* always claimed to go to *Harford* run, and said his father's deed would carry him to *Jones' Falls* ; that *Inloes* fence stopped the wash. There was a fence as far as *Eden* street ; witness saw it when he was filling up *Eden* street ; that in 1819 there was firm land at the corner of *Canal* and *Lancaster* streets ; that witness used to cut grass there ; that the squares above *Aliceana* street, between *Eden* and *Caroline* streets, were covered with water after the lower squares were filled up. Cross examined, he says, that the square in dispute was enclosed eight or ten years ago, and that the fence was put around it after the filling up was finished ; that *Inloes'* fence began on the east side of *Caroline* street, and ran west of it ; that the first time he saw it was in 1817 or 1818 ; that it was made of stakes driven down and boards nailed to it ; that in 1819 there was no attention paid to it, as the ground was filling up ; that the stakes, when he first saw the fence, were broken off, and were then some two or three feet apart ; that in 1818 the stakes were three feet above the mud, and that when the lot was filled up it was filled three or four feet above the tops of the stakes.

And the defendants further offered evidence, by *Abraham Parks*, that he remembers that about thirty years ago *Inloes'* fence was first done ; that witness was in the business of hauling dirt and gravel, and asked *Inloes'* leave to throw out dirt and stones on his lot ; that the lot went out then, which was about twenty years ago, pretty far ; does not know whether it was high ground beyond *Caroline* street ; that it was dry a good smart place beyond *Caroline* street. That he speaks of the street (*Aliceana* street) west of *Caroline* street as dry about



one hundred feet out ; he got permission of *Inloes* before the war to cast dirt and stone along his fence, and did so ; he had the filling up of the street, (*Aliceana*,) and hauled a good many loads to it after he got *Inloes'* permission ; that the fence was up then ; that *Inloes'* fence was repaired from time to time.

The defendants further offered evidence, by *Alexander J. Bouldin*, surveyor of *Baltimore* county, that he executed a special warrant as for vacancy in the year 1836, for a piece of ground, including the ground now in question, issued to *James Tracy* and the heirs of *John Hammond*, and returned the survey to the land office.

And the plaintiff thereupon, further to prove the issue on their part, offered evidence by said *Bouldin*, that the ground now in question was not yet enclosed on the — August, 1839, and that *William Inloes* claimed the ground now claimed by him, on the ground, as he stated, that he had a right to follow the water and to go wherever the water went.

And the plaintiff further offered testimony, by — *Abbott*, that one *Spencer* made a fence, with stakes driven down, beyond *Spring* street, and that was in his opinion the fence mentioned in *Frazier's* testimony, as extending to *Eden* street from *Spring* street.

And the plaintiff further offered to prove by said *Bouldin*, that at all times while the ground was making in the cove, it was the prevalent opinion in that neighborhood that the title to the ground, making by nature or artificially, was in the State or the city, and not in any owners of any of the banks of the cove. But to the admission of this testimony the defendants objected, and the court (*ARCHER, C. J.*) refused to admit the same to be given. The plaintiff excepted.

2ND EXCEPTION. And the plaintiff and defendants having respectively offered the testimony stated in the foregoing bill of exceptions, which is made part of this bill. The plaintiff thereupon, further to prove the issue on her part, offered in evidence the following certificate from the debt book of the *Province of Maryland*. (See ante pages 446, 447.)

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And the defendants, further to prove the issue on their part, offered to read in evidence the following certificate from the rent-roll of the Province :

Acres.	Rent.		Acres.	Rent.		
200	0 8 0	<i>Mountenay's Neck,</i>			<i>Thomas Sligh from Thomas Sheredine, 26th June,</i>	1756
		<i>Escheat.</i>				
		Land originally so called lying on the north side of the N. W. branch of Patapasco river. Resur- veyed 27th April, 1737, for William Fell.	10	0 0 5	<i>Peter Lettage from Thos. Sligh, 20th May,</i>	1757
					<i>Thos. Sligh from Bryan Philpott, 9th June,</i>	1758
			200	0 8 0	<i>Thos. Sligh from Edward Fell, 14th August,</i>	1758
100	0 4 0	<i>Thomas Sligh,</i>	14½	0 0 7	<i>Thomas Hammond from Thos. Sligh, 31st January,</i>	1759
100	0 4 0	<i>Thomas Sheredine,</i>			<i>Thos. Sligh from Charles Carroll, Esq. 31st May,</i>	1759
		<i>Possessors.</i>				
			2	0 0 1	<i>John Brustal from Thos. Sligh, 28th June,</i>	1759
			4	0 0 2	<i>John Hammond Dorsey from Thos. Sligh, 6th November,</i>	1759
			4	0 0 2	<i>William Young from Thos. Sligh, 8th November,</i>	1759
			8¾	0 0 4½	<i>Alexander Stewart from Thos. Sligh, 28th November,</i>	1759
			2	0 0 1	<i>Daniel Bernet from Thomas Sligh, 28th February,</i>	1761
					<i>Peter Woolrick from Thomas Sligh, 21st May,</i>	1762
			6	0 0 3	<i>Jacob Myers from Thomas Sligh, May 3rd,</i>	1766
			9½	0 0 5	<i>John Deaver from Thomas Sligh, July 17th,</i>	1766
			9	0 0 4½	<i>John Deaver from Thomas Sligh, March 28th,</i>	1767
			6	0 0	<i>Jacob Myers from Thomas Sligh, 2nd July,</i>	1768
			1	0 0 1	<i>James Sterret from John Askers, 26th September,</i>	1771
			1	0 0 1	<i>James Sterret from John Devour, 8th May,</i>	1773
					<i>J. Cornthwaite &amp; G. Hopkins from J. Devour, 21st June, 1773</i>	

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In testimony that the foregoing is a true copy from the old rent roll for *Baltimore* county, No. 1, folio 220, one of the records belonging to and remaining [Seal place.] in the Western Shore Land office of *Maryland*, I have hereunto set my hand, and affixed my official seal, this 8th day of November, 1842.

GEO. G. BREWER, *Reg. Land Office, W. S. Md.*

The plaintiff objected to the admission of said last testimony, and the court (ARCHER, C. J.) allowed the said paper to be read in evidence. The plaintiff excepted.

3RD EXCEPTION. And the plaintiff and defendants, having offered the testimony stated in the foregoing bills of exception, which is made a part of this bill, the plaintiff, further to prove the issue on her part, offered in evidence the patent of *Rogers' Inspection* :

MR. WILLIAM ROGERS—*patent fifty-three acres—Rogers' Inspection. Frederick, &c.* Know ye, that whereas, *William Rogers*, by his humble petition to our agent, for management of land affairs within this Province, did set forth, that a certain *John Boreing* had, on the 20th day of April, seventeen hundred and forty-two, surveyed and laid out for him a tract or parcel of land called *Boreing's Convenience*, lying and being in the county aforesaid, containing seventy-five acres, by virtue of an assignment for that quantity from *Thomas Sheredine*, being part of a warrant for four hundred acres, granted said *Sheredine* the twenty-fourth day of October, seventeen hundred and forty-one, as per the certificate thereof, taken and returned in the land office might appear; the petitioner further showed that the said certificate had laid over since in the office postponed, and no patent had ever yet issued thereon, and as the two years for suing out such grant was expired, the petitioner was desired, that by sundry of our proclamations published, the certificate aforesaid was become null and void, and the land and premises therein mentioned subjected to the benefit of the first discoverer, and inasmuch as the petitioner was the first discoverer; and desired to take up and pay for the same, humbly prayed a special warrant to resurvey the aforesaid tract,



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with the liberty of adding any contiguous vacancy, and return of a certificate of such resurvey, he paying the caution money, and complying with all other requisites usual in such cases, might have our grant issue unto him thereon, which was granted him ; and accordingly a warrant on the twenty-seventh day of April, seventeen hundred and fifty-nine, unto him for that purpose did issue ; but the said warrant not yet being executed, it was on the eighteenth day of June, seventeen hundred and fifty-nine, renewed and continued in force for six months longer from that date, with liberty therein given to include a certain tract of escheat land called *Bold Venture*, contiguous to the former tract, originally granted unto a certain *John Oulton*, for one hundred and sixty-one acres, died seized thereof intestate, and without heirs, by which means the same became escheat to us, humbly prayed to be admitted to the purchase of the said escheat, being it escheat by the means aforesaid, for any or other ways or means whatsoever. In pursuance whereof it is certified in our land office that the aforesaid tracts or parcels of lands are surveyed, by which it appears that that tract called *Boreing's Venture*, clear of elder surveys, contains no more than the quantity of twenty-seven acres, and that that parcel of escheat land called *Bold Venture*, also clear of elder survey, contains no more than the quantity of twenty-one acres ; and that there is the quantity of five acres of vacant land added, for which he has paid, &c. We do therefore hereby grant and confirm unto him the said *William Rogers*, all them the aforesaid two tracts or parcels of land now resurveyed and called "*Rogers' Inspection*," beginning for the first mentioned part in the east line of a tract of land called "*Todd's Range*," and where the said east line of *Todd's Range* intersects the west side of "*Jones' Falls*," and running thence, bounding on and with the said east line of *Todd's Range*, east one hundred and ninety-eight perches, until it intersects the south-southwest, three hundred and twenty perches, line of the original escheat tract of land called *Bold Venture*, then bounding on and with that line south-southwest, twenty-nine perches, until it intersects the east line

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of a tract of land called *Cole's Harbour*, then bounding on and with that line of *Cole's Harbour*, east sixty perches, until it intersects the north-northeast, three hundred and twenty perches, line of a tract of land called "*Mountenay's Neck*," then bounding on that line to the end thereof, north-northeast forty-four perches, then west-northwest fifty-four perches, unto the end of the west-northwest, fifty-four perches, line of the original escheat tract, called "*Bold Venture*," then south-southwest twenty perches, until it intersects the east, one hundred and eighty-one perches, line of a tract of land called *Garrow Barrow*, then bounding on that line reversed, of the same west one hundred and twenty-two perches unto the end of the south, six degrees west, thirty-seven perches, line of said land, then bounding on that line, reverse of the same, north six degrees east, twenty-nine perches and three quarters of a perch, until it intersects the east line of a tract of land called "*Hanson's Wood Lot*," then bounding on that line, reverse of the same, west twenty-one perches and half a perch, until it intersects the south by west line of a tract of land called *Salisbury Plains*, then bounding on and with that line to the end thereof, south by west thirty-nine perches, then bounding and with the given line of *Salisbury Plains*, north forty-one degrees and thirty minutes west, ninety-one perches and half of a perch, until it intersects the given line of a tract of land called *Lunn's Lot*, and then with a straight line to the place of beginning; containing and laid out for fifty acres and the fourth part of an acre, more or less. Beginning for the other part at a bounded white oak standing near the side of the northwest branch of *Patapsco*, it being the second bounded tree of a tract of land called *Mountenay's Neck*, and running thence, bounding on the said land, east-southeast seventy-one perches, unto a creek of the said northwest branch, then bounding down with the said creek, south twenty degrees, west seven perches unto the mouth of said creek, then bounding upward on said northwest branch, the four following courses, viz: north fifty-eight degrees west, thirty-five perches, south eighty degrees west, sixteen perches, north seventy-four degrees west, ten perches, north

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thirty-three degrees west, twenty perches, and then with a straight line to the beginning; containing, &c.; to have and to hold the same, unto him the said *William Rogers*, his heirs and assigns forever, in the year, viz. the feast of the Annunciation of the Blessed Virgin Mary and St. Michael, the Arch Angel, by even, &c.

And thereupon, the plaintiff and defendants, respectively, prayed the court in their respective parts, as follows :

*Plaintiff's Prayers from No. 1 to 16.*

1st. If the jury shall find from the evidence that a patent was granted by the *State of Maryland* to *Alexander Mountenay* for *Mountenay's Neck*, on the 30th June 1663, and a deed from *Samuel Wheeler and wife* to *Daniel Jones*, of the 22nd March 1685, and the deed from *Blunt* to *Todd*, of the 4th October 1689, and the deed from *Todd* to *Hurst*, of the 3rd of March 1701, and the deed from *Todd* to *Charles Carroll*, of the 16th June 1701, and the deed of mortgage from *John Hurst* to *Richard Colegate*, on the 13th October 1702, the deed from said *Hurst* to *Thomas Sheridine* and *Thomas Sligh*, of the 19th March 1749, and the will of *Richard Colegate* of the 8th day of August, 1721, in favor of his two sons, *John* and *Thomas Colegate*, and a deed from the said *John* and *Thomas Colegate* to *Thomas Sheridine* and *Thomas Sligh*, of the 15th November 1750, a deed from *Thomas Sheridine* to *Thomas Sligh*, of the 26th June 1756, a deed from *Charles Carroll* to *Thomas Sligh*, of the 31st May 1759, the deed from *Thomas Sligh* to *Thomas Hammond*; and that said *Thomas Hammond* died before the Revolution, leaving *William Hammond*, his eldest son and heir at law, and that he inherited the land of his father *Thomas*, as such heir; and if the jury find the two deeds from the said *William Hammond* to *John Cornthwaite*, of the 20th September 1775 and of the 2nd of April 1779, and the two deeds from *John Cornthwaite* to *John Hammond*, of the 24th September 1779 and of the 7th June 1780, and the deed from *John Hammond* to *John Anderson*, of the 4th March 1795. And if the jury believe that *John Hammond* intermarried with the plaintiff in this case soon after said last mentioned deed, and



that she was the sister of *John Anderson*. And if the jury believe that said *John Anderson* departed this life about the year 1805, without ever having been married, and that said *John Hammond* also died soon after him, and that the plaintiff in this cause afterwards intermarried with a certain *R. Casey*, who also departed this life before the institution of this suit. And if the jury further find from the evidence that said *James Todd* was in possession of *Mountenay's Neck* as early as the year 1700, and that those claiming under said *Todd* have continued in possession of the same, or parts thereof, according to their deeds, or as they became entitled thereto by will or descent, down to the present time, and also the record of ejectment of 1703, that *John Hammond* was in actual possession of that part of *Mountenay's Neck* embraced in the deeds to him from *Cornthwaite*, during his life, and filled up on the water front of his lot, and in this way and by the wash from the upper ground through *Caroline* street, other land was made fast land, and added to his, and if he leased the same, or a part thereof, to *McDowal*, as stated in the evidence, and collected the rent from him; and that if, since the death of the said *Hammond*, those who claim under him have been in possession of the said property, and collected the rents thereof, or of such portions as have been leased, then if the jury believe the preceding facts, they are bound to presume a deed from said *Alexander Mountenay*, or those claiming under him, to said *Samuel Wheeler and wife*, and from said *David Jones* to said *Robert Blunt*, or his ancestor, for the tract of land called *Mountenay's Neck*.

2nd. And if the jury believe, in addition to the facts set forth in the above or first prayer of the plaintiff, that the square of ground between the *City Dock* and *Aliceana* street, and *Caroline* and *Spring* streets, was filled up and made fast land by the authorities of the city of *Baltimore*, under the ordinance of 1823, and the other ordinances given in evidence, and was completed about the year 1836, and the defendants were in possession thereof at the institution of this suit, then the plaintiff is entitled to recover.

3rd. If the jury believe the facts sets forth in the plaintiff's first and second prayers, and also, that plaintiff, and those under whom she claims, have been in possession of the part of said property, by having a house erected upon it, and by the actual enclosure of a board fence, then the defendants cannot avail themselves of any title from presumption, except of such part as they can prove that they have also been possessed of by actual enclosure for twenty years next before the impetration of the writ in this cause.

4th. That the defendants in this case cannot avail themselves of the benefit of a presumption of a grant to them for the property in dispute, unless they show by strong proof a continuous and uninterrupted possession thereof for twenty years next before the institution of this suit.

5th. That there is no evidence in this case to prove such possession.

6th. That the defendants cannot be allowed to avail themselves of any possession so as to defeat the title of the plaintiff, further than such possession is located on the plats in this case.

7th. That the acts and possession of any one of the said defendants cannot avail the other defendants by affording to them the benefit of a presumption of a grant.

8th. That before the jury can find a title in the defendants, or any one of them, by presumption of a grant from the plaintiff, or those under who she claims, they must believe in their conscience, and find as a fact, that such grant was actually made.

9th. And that such grant was made by the plaintiff to the defendants, by deed regularly executed and acknowledged.

10th. That if the jury believe the evidence in this case, they cannot presume a grant from the plaintiff, or those under whom she claims, to the defendants, or either, from any acts or possession of the defendants, given in evidence, between the years 1783 and 1823.

11th. That the title of the plaintiff cannot be affected by adding together the different possessions and acts of the de-

fendants, at long intervals, in point of time, so as to make out twenty years, nor can the possession of the defendants on the east side of *Caroline* street be connected with possession on the west side thereof, so as to make out the twenty years; but possession from which the presumption may be created, must be confined to the property in dispute.

12th. That the statute of limitations of *James* does not apply to the circumstances of this case, as stated in the evidence.

13th. If the jury find the patents, deeds and ordinances offered in evidence in this cause by the defendants, and that they were so offered by the defendants to show that they had the superior, better and more ancient right to extend, fill up, and improve in front of their own lots, than the plaintiff, and those under whom she claims, have in front of her lot, then no possession which has been proved in this case on the part of the defendants, or any of them, can give rise to a presumption of a grant to the defendants from the plaintiff, as the claim of a better title on the part of the defendants than the plaintiff ever had, if the jury find such claim, is wholly inconsistent and at war with such presumption.

14th. That if the jury believe that *Island Point* was resurveyed and other land added to it by *William Fell* in 1761, and that the whole were included in one tract under the name of *Fell's Prospect*, and that a patent of the same was granted to said *Fell* at the above date, and if they believe from the fact that the defendants have offered in evidence the said patent in this cause, as part of their title that they cannot now claim under the patent of *Island Point*, as a subsisting independent patent, but they must claim, if at all, by the relation to it of the patent of *Fell's Prospect*.

15th. That, even if the jury should believe from the evidence that *Thomas Sligh* claimed under the escheat patent of *Mountenay's Neck* to *Edward Fell* in the year 1737, still the said *Thomas Sligh*, and those claiming under him, have a right to go back by relation to the original patent of *Mountenay's Neck* in 1663, and to date their title from that period.

16th. The plaintiff further prayed the court to instruct the jury, that if they shall believe the evidence offered in this case



by the plaintiff and defendants, then they may and ought to presume a deed from *A. Mountenay*, or his heirs, to *Wheeler and wife*, and from *Daniel Jones*, or those claiming under him, to *Robert Blunt*, or his ancestor, for the tract of land called *Mountenay's Neck*.

*Defendants Prayers, No. 1 to 4.*

1st. That if the jury find that the tract called *Bold Venture* was granted as given in evidence by the defendants, and that the same is truly located on the plats in the cause by defendants, that then the patent of *Mountenay's Neck* gives no title to the lessors of the plaintiff to the lot of ground for which the defendants have taken the defence on the plats.

2nd. That if the jury find the existence of the grants of *Long Island Point* and *Island Point*, offered in evidence by the defendants, and that the location of the first tract of those is as made by defendants, and the location of the latter is according to either of the locations of the same as made by the defendants; and if they also find, that in 1734, when the survey of said latter grant was made and the patent granted, the water of the *Patapsco* ran up to and adjoined the line of said tract, according to one of the locations thereof aforesaid, that is to say, the line from red K to red L, or run east of that line, that then the defendants, and those under whom they claim, were as between themselves and the lessors of the plaintiff, and those under whom they claim, the elder riparian owners of the water lots on *Bond* street, in front of which, the lots run in controversy, included within the defendants defence on the plats in the cause, to the legal ownership of the plaintiff of the lots on *Wilkes* street; and if the jury find those facts, that then the plaintiff is not entitled to recover.

3rd. That if the jury find the existence of the grants of *Long Island Point* and *Island Point*, offered in evidence by defendants, and that the location of the first of these tracts is as made by defendants, and the location of the latter is according to either of the locations of the same as made by defendants; and if they also find, that in 1736, when the survey of said latter grant was made and the patent granted, the water

of the *Patapsco* river ran up and along the line of said tract, according to either of the locations thereof aforesaid, that is to say, the line from red K to red L, or ran east of that line; and if the jury shall also believe that *Mountenay's Neck* rightfully escheated, that then defendants, and those under whom they claim, were as between themselves and the lessors of the plaintiff, and those under whom they claim, the elder riparian owners of the water lots on *Bond* street, in front of which the lots now in controversy, included within the defendants defence on the plats in the cause to the ownership of the plaintiff of the lots on *Wilkes* street, and if the jury find these facts, then the plaintiff is not entitled to recover.

4th. If the jury find that the tracts of land aforesaid, *Bold Venture*, *Long Island Point* and *Island Point* and *Fell's Prospect* were granted, as offered in evidence by defendants, and that the locations thereof as made by defendants are correct; and if they also find that the defendants, and those under whom they claim, have, from the year 1795 to the present time, been claiming and being in possession of the lots on *Bond* street, numbered from 5 to 9, as those lots are located on the plats in the cause, and always also claimed the right to improve their said lots by extending them into the water, under the authority of the Act of *Maryland* of 1745, ch. 9, and to be entitled to the land which might be so made out of the water in front of said lots; and if the jury further find, that one of the owners of said lots, that is, lot No. 5, in the year 1795, extended the front of his said lot from D to L, claiming to have the right to do so as aforesaid, and took possession thereof, and he, and those claiming under him, ever since exclusively held and owned the same as the fee simple owners thereof; and if they further find, that afterwards, in the assertion of the same right, the defendant, *Inloes*, claiming to have the right to do so, and to be entitled to the land which might be made by him in front of the said lot owned by him, erected the fence from P to Q, in the rear of the said lot No. 5, for the avowed purpose, by means thereof to intercept all the wash or sediment which, from any cause, might come down against the

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said fence, and to cause the same to settle there, and convert the water there then into land, as a part and parcel of said lot No. 5 extended, and also throughout openly declared that he had and claimed the right, if the city would permit it, and would, as soon as they did permit it, carry and extend his said lot over and across *Eden* street and as far as *Canal* street; and if they also find, that when said fence was so as aforesaid made by *Inloes*, the city of *Baltimore* had passed its ordinance of the 1st May 1801, given in evidence by defendants; and if they find, that from time to time the washings and sediments aforesaid settled in and along said fence from P to Q, so as to make portions of the same dry land as late as 1810, and that as soon as the same became land, the same was taken possession of by *Inloes* claiming title to the same, and using it absolutely as his own; and if they further find, that for the like purpose of making the whole of his said lot to extend to the limits of said fence, he caused dirt from time to time, from 1805 to 1818, to be hauled and deposited along the same, and in that way, with the aid of the washings deposited in the same place, to convert the same into land, and that as the same was so made, he took possession thereof, and used, and claimed title to the use of the same; and if they further find, that the city afterwards passed the ordinances of the 24th March 1813, 25th March 1814, 25th May 1816, 11th March 1823 and 13th April 1826; and if they also find, that the city acted under said ordinances, and went on from time to time to make the improvements contemplated by the same in that part of the property on the plat which lies between *Lancaster* and *Aliceana* streets on the north and south, and *Canal* street on the west, and *Bond* street on the east, to and with the aid and at the expense, as far as the same was charged to individuals, of the defendants, and those under whom they claim, on account of the lots aforesaid on *Bond* street; and if they further find, that as soon as the said ground was made by all those conjoint means, and from time to time as the same was made, the defendants, or those under whom they claim, took adversary possession of each and every part thereof, lying annexed to



and in front of their said several lots on *Bond* street, and that as streets were opened over and across to them, they paid the assessment upon said property, levied by the city authorities for the making of such streets, and they also paid all the other taxes which have been levied upon said property since the same was made, and always, during all of said period, claiming title to said property, and being in the adversary use and possession thereof; and if they further find, that during the said period the said defendants, and those under whom they claim, always asserted their right to extend their said lots on *Bond* street east to *Canal* street, and that such claim of right and such possession of the property as was from time to time taken by them, and such means as were adopted by them to make such extensions, were all notorious and well known to the lessors of the plaintiff; and if they further find that plaintiff, or those under whom she claimed, never claimed or used her or their right to extend her said lot on *Wilkes* street further than *Aliceana* street, and never gave any notice to the defendants or those under whom they claim, that when the particular property in dispute should by them, at their expense, be made, that she would claim title to the same, or in any manner disturb the right and interest of the defendants, or those under whom they claim in said property when the same should be made, and that they never have paid or offered to pay the taxes on the same; and if they further find that *Chapman*, one of the defendants, in the year 1826 or 1827, built the glass house at the corner of *Caroline* and *Lancaster* streets, and has, until the institution of this suit, held peaceable possession of the same, claiming title to the same; if they also find that *Hammond* and *Pinkney's* heirs claiming title to the lots on *Wilkes* street immediately north of that part of the property made as aforesaid by defendants, which lies between the west side of *Caroline* street and *Spring* street, together with a certain *Klinefelter*, took up said part of said property, and the square lying immediately west thereof, and running into *Canal* street, as vacant land, without they, the said *Hammond* and *Pinkney's* heirs, claiming the same by virtue of their title to

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the said lots on *Wilkes* street; and if they further find that neither said plaintiff nor any other proprietor of the lots on *Wilkes* street have ever paid or tendered to pay to the defendants, or any one else, the expense of making said property; that then, first, the lessor of the plaintiff is barred by the statute of limitations from recovering in this suit the land included within the lines of the defendants defence as located upon the plats; or if not so barred, that then, second, the jury may and ought to presume that the proprietors of that part of *Mountenay's Neck* lying immediately north of the first line of that tract, as located on the plats from black M to black N, and immediately north of the ground so made as aforesaid by the defendants, and those under whom they claim, which was adjoining to and immediately west of the defendants lots aforesaid on *Bond* street, as far as and including the whole of said ground embraced in the defendants said defence, have granted the same to the defendants or those they claim under; or third, that then they may and must presume that the patent of *Mountenay's Neck*, in whom, at any time prior, riparian right to improve under the said act of 1745, or those claiming under them, may have existed, had surrendered and granted to the defendants, or those under whom they claimed such right, so as to authorise and entitle said defendants, and those under whom they claim, to improve, to the exclusion of such and those claiming under him, their said lots on *Bond* street to the same purpose and with the like effect as if they, the said defendants, and those they claim under, were, by virtue of grants from the State, the riparian proprietors of said lots prior, in point of time and right, to the said patentee and those claiming under him of *Mountenay's Neck*.

Whereupon the court granted the first and sixteenth prayers of the plaintiff, and rejected her prayers numbered from two down to fifteen inclusive, and rejected the first, second and third prayers of the defendants, and granted their fourth prayer; to the granting of the fourth prayer of defendants, and to the rejection of her prayers from two to fifteen, the plaintiff excepted, and to the granting of first and sixteenth of plain-

tiff's prayers, and to the rejection of their first, second and third prayers, the defendants excepted.

4TH EXCEPTION. The court having decided, as stated in the preceding exception, upon the several prayers of the plaintiff and defendants, the plaintiff gave in evidence the deed from *Samuel Wheeler* and *Ann* his wife, to *David Jones*, of 22nd March, 1685, heretofore offered by defendants, and it being agreed that all the evidence in the prior exceptions should be considered as a part of this exception, the plaintiff, by her counsel, prayed the court to instruct the jury, as follows :

1. That there is no evidence of adverse possession, for twenty years before the institution of this suit ; and that the plaintiffs are not barred by any possession which the defendants or any of them have proved.

2. That the bar of adversary possession cannot apply in this case, unless it be shown to have been defined and uninterrupted ; and that the defendants are not entitled to any portion of the land in controversy, not included in such definite and uninterrupted possession, and except so far as the defendants shall have shown such possession, and for the term of twenty years before the bringing of this suit.

3. That if the jury believe that the land in controversy did not become fast land, so that the water did not flow over it at ordinary tides, within twenty years before the bringing of this suit, then no adversary possession thereof can be found to bar the plaintiff's recovery.

4. That there is no evidence in this case from which the jury are at liberty to presume that any deed or grant was ever made by the lessor of the plaintiff or those under whom she claims, of the land in controversy, or the right to extend into the water.

5. That the jury cannot presume any such deed or grant, if they believe that the defendant *Inloes* claimed the right to extend his wharf, by virtue of his ownership, under title from his father, of the land on *Bond* street, and with permission of the city.



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6. That the jury, to make the presumption of a deed or grant as above mentioned, must be satisfied that in point of fact a deed was executed by the plaintiff's lessor, or some one under whom she claims, of their interest in the land in controversy, or their right to extend the land into the water to the defendants, or some one of them.

All of which prayers the court (ARCHER, C. J.) refused to grant. The plaintiff excepted.

5TH EXCEPTION. The counsel for the plaintiff further prayed the court to instruct the jury upon the evidence given, as stated in the preceding bills of exceptions, which is to be taken as a part of this bill of exception, that there is no evidence in this cause that any one of the defendants, except *Inloes* and *Chapman*, ever had possession of any portion of the property in dispute, even for a day, or made any entry into it, previous to the time when it was filled up and made fast land by the city of Baltimore in the year 1836, or when the jury may find that it was filled up; that there is no evidence that *Chapman* ever had possession of any of said property, or exercised acts of ownership over it previous to about the year 1826; and that if the jury believe the facts set forth in the plaintiff's first, second, and third prayers, then the plaintiff is entitled to recover against all the defendants except *Inloes*; which the court (ARCHER, C. J.) refused to grant. The plaintiff excepted.

6TH EXCEPTION. The patents and deeds of records offered in evidence by the plaintiff, being offered, subject to all exceptions to which the same might be liable, the defendants, by their counsel, objected to the admissibility in evidence of each and every of said patents, deeds, and records; but the court overruled the objection, and suffered each and every of said patents, deeds, and records to be given in evidence to the jury. The defendants excepted.

The parties then filed the following agreement, to wit:

It is agreed that the plats on file in this case, or made for the parties, may be used to every effect in the Court of Appeals, as if the same were copied and sent up with the record; and that the explanations in like manner may be used; and

that neither the plats nor the explanations need be copied into the transcript for the Court of Appeals. It is agreed, also, that the plat of the city designating the improvement to be made under the ordinance of 1823, may be also used without being copied with the transcript, and likewise the plat of *Fell's Addition* to *Baltimore* town, of 1773; and that all the ordinances and laws given in evidence in the above case may be read in the Court of Appeals from the printed laws and ordinances, and that the same shall not be copied in the record. It is also agreed that the plot from the City Atlas of 1824, offered in evidence, shall not be inserted into the record, but a copy of the same, by *A. J. Bouldin*, may be used in the Court of Appeals.

The verdict and judgment being against the lessor of the plaintiff, she appealed to this Court.

*Explanations of the plot published with this report, which however only contains such portions of the survey, as give a general view of the controversy.*

1. The plaintiff claimed from W to X, then to the water of the City Dock, then bounding on the water of the Dock to *Caroline* street, and then on *Caroline* street to W.

2. The defendant took defence for all the land lying between the *W.* side of *Caroline*, and *E.* side of *Spring* street, and the *S.* side of *Aliceana* street, and *N.* side of *Lancaster* street.

3. M is the admitted beginning of *Mountenay's Neck*, as surveyed in 1737, for *Wm. Fell*, and the *N. W.* line from that point, is its first line.

4. *Bold Venture* was located by the plaintiff in three ways. The first line of which was from the southern A to M, and located as a tract for 161 acres. It was also located as clear of elder surveys according to the recitals in the patent of *Rogers' Inspection*, of the 28th Sept. 1759, in two other modes, the lines of both of which parcels are clear of this controversy, and do not affect it. In that patent the original grant is assumed to have encroached on elder surveys.

5. V to W to X and Y, shew the permission of the *Port Wardens* of *Baltimore* to *John Hammond*, in 1784, to extend his improvements into the water west of *Caroline* street, to the *Port Warden's* line on the south.

6. The deeds from *John Cornthwaite* to *William Hammond*, were so located by the plaintiff as to show a claim to the water line of the river at Y and V, the water at one time flowing to the shore at those points.

7. The defendants located W to X to 109 to 110 and to W, as being in their possession.

8. The defendants located *Bold Venture* as beginning at the southern A, and thence to M, and with the line from M to N, so as to include a part of the City Dock, and as conforming to the original grant for 161 ac's.

9. The line of the water as it flowed in 1783, is shown by the dotted lines from A to Y, V, B, C, F, according to the depositions of *E. Smith* and *William Dawson* for the plaintiff.

10. The line of the water as it flowed in 1801, according to defendants depositions, is shown by the dotted line south of the preceding line from G to F.

11. The dotted line from L to O shows the line of logs run out by *Joshua Inloes*.

12. The dotted line from P to Q west, shows the water-fence as extended by *William Inloes*.

13. The numbers 5, 6, 7, 8, 9, show the leases from *Ann Fell*, on *Bond street*; No. 5 being to *Abraham Inloes*.

14. No. 1 to 11 shows the water in 1734 *W.* of the leased lots which are located on the original plats with shaded lines as bordering on the water.

15. No. 10, located as the lease from *John Hammond* to *Thomas McDwall*, 28th February, 1798.

The cause was argued before DORSEY, CHAMBERS, and SPENCE, J.

By MAYER and DULANY for the appellants, and

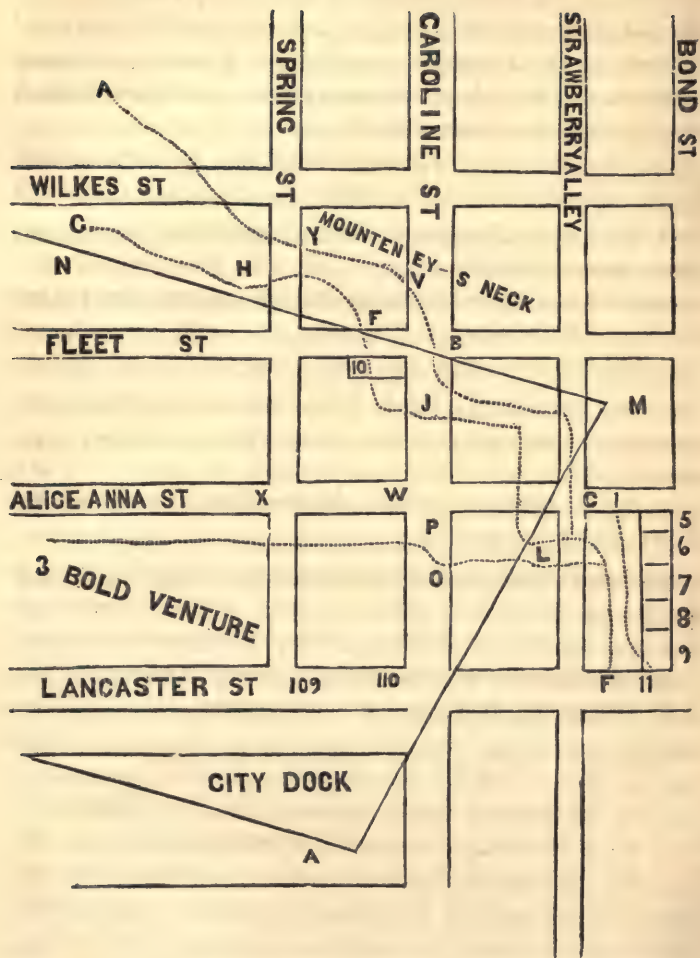
By GILES and McMAHON for the appellees.

DORSEY, J., delivered the opinion of this court.

With the county court's refusal to admit the testimony offered by the plaintiff in his *first* bill of exceptions, and objected to by the defendants, we entirely concur. It was immaterial and irrelevant to any of the issues in the cause. A prevalent opinion in the neighborhood, even if known and adopted by the lessor of the plaintiff, as to her legal rights, whether founded in error or not, does not at law prevent the running of the statute of limitations, nor repel the legal presumption of a grant arising from adverse possession, long continued and acquiesced in.

We also concur with the county court in admitting to the jury the certificate of the rent roll, offered in evidence by the





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defendants, as stated in the plaintiff's *second* bill of exceptions. The rent rolls, which are books kept in the several counties of the State during the Proprietary Government of *Maryland*, by officers called rent roll keepers, were designed to show, in the respective counties, the grants of land made by the Lord Proprietary; the names of the subsequent alienees thereof; and the names of those who were in possession of the same; and the quit-rents with which they were chargeable. In all cases of controverted possession, or where possession was relied on as evidence for the presumption of a grant, certified extracts from the rent rolls, showing who were the possessors of the lands at the period in question, have been received by the courts of *Maryland* as competent testimony. But though the evidence objected to was admissible, after the testimony previously given in the cause, it is difficult to conceive why it should have been offered by the defendant; or if offered, why objected to by the plaintiff. If adduced as evidence of the escheat grant to *William Fell*, it could neither benefit the defendant nor damnify the plaintiff; as the escheat patent itself, which is conclusive evidence of the fact, had already been in evidence before the jury. And if it were produced as evidence of *William Fell's* possession under his escheat grant, so far as it proved any thing, it disproved that fact, by showing that he never was in possession under his escheat grant, and that no quit-rents had ever been charged against him. It would be extremely difficult to account for the rent roll keeper's wholly omitting to charge *William Fell* with the quit-rents as the possessor of *Moutenay's Neck*, upon any other hypothesis, than that upon an investigation into the subject by the rent roll keeper, he discovered (what the testimony in this cause renders more than probable,) that *William Fell* took nothing under his escheat, and consequently was not charged with the payment of quit-rents. But the effect of this rent roll extract is not only to disprove that *William Fell* was the possessor, or chargeable with the quit-rents of *Moutenay's Neck*, but it shows that previous to the year 1756, and more than two years before the conveyance from *Edward Fell* to

*Thomas Sligh*, *Thomas Sligh* and *Thomas Sheridine* were the possessors of *Moutenay's Neck*, and charged with the quit-rents payable thereon. Facts strongly corroborating (if corroborating testimony were wanting,) the evidence the plaintiff had before offered in support of his claim and pretensions.

The plaintiff's counsel, by the *first* prayer in the *third* bill of exceptions, call upon the court to instruct the jury, that, if they believe the facts enumerated in the prayer, "they are bound to presume a deed from said *Alexander Moutenay*, or those claiming under him, to *Samuel Wheeler and wife*, and from said *David Jones* to said *Robert Blunt*, or his ancestor, for the tract of land called *Moutenay's Neck*." These enumerated facts do not show that the plaintiff, or any of those under whom she has offered evidence of her deduction of title, ever held under either *Wheeler and wife*, or *Jones*, or received from them any conveyance of *Moutenay's Neck*, or that they, or either of them, ever were possessed of any part thereof. The only fact tending in the slightest degree to connect *Wheeler and wife* and *Jones* with the tract of land called *Moutenay's Neck*, is the isolated deed from *Wheeler and wife*, by *Thomas Lightfoot*, their alleged attorney, to *David Jones*. In the absence of all proof that *Wheeler and wife* were entitled to the land, or had been in possession of any part thereof, or that *Robert Blunt*, or those claiming under him, ever acquired, or claimed to hold title or possession under either *Wheeler and wife* or *Jones*, upon what ground could the court be called on to direct the jury to presume a deed from *Alexander Moutenay*, or those claiming under him to *Wheeler and wife*, and from *David Jones* to *Robert Blunt*? There is not a scintilla of evidence from which it can be legitimately inferred that *Blunt* derived either title or possession from *Jones*, or that *Wheeler and wife*, or *Jones*, or any person claiming under them, were at any time in possession of the land in question. Upon what basis then could the plaintiff rest the presumption, which she demanded of the jury through the agency of the court?

Had the plaintiff have required of the court an instruction to the jury, that they must presume a deed for *Moutenay's*



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*Neck*, from *Alexander Mountenay*, or those claiming under him, to *Robert B. Blunt*, it would be difficult to discover a reason why it should not be granted. From *Robert B. Blunt* the paper or record title of the plaintiff was perfect, the only link, in her chain of title, which was wanting, was that from *Alexander Mountenay* to *Robert B. Blunt*. To supply this defect, by way of legal presumption, all that was requisite was to prove to the jury a continuous possession of twenty years or upwards, in *Robert B. Blunt*, or those claiming under him. And of this fact there was abundant proof. Far more than from the antiquity of the possession proved, and nature and circumstances of the case, could reasonably have been required or expected. The conveyance of *Robert B. Blunt* to *James Todd*, for *Mountenay's Neck*, bore date on the fourth day of October, in the year sixteen hundred and ninety-five. Of *Robert B. Blunt's* possession, no direct proof has been offered; and none could reasonably be expected, after a lapse of nearly one hundred and fifty years. But of the possession of his grantee, *James Todd*, there is proof, and that too coming in such an unquestionable shape, that it cannot be doubted. About three years after the date of the deed from *Blunt* to *Todd*, on the 17th of February 1698, the surveyor of *Baltimore* county, a public officer of the Lord Proprietary, who was upon the land and an eye witness of what he stated, who could have had no motive for misrepresentation, in the discharge of a necessary official act in respect to the survey of the tract of land called "*Todd's Range*," certifies to the register of the Land Office, that it began "at a bounded white oak, standing in the line of a parcel of land formerly belonging to *Alexander Mountenay*, and now in the possession of the aforesaid *Todd*." On the 13th of March 1701, *James Todd* conveyed that part of *Mountenay's Neck*, connected with the present controversy, to one *John Hurst*, who, by deed of mortgage bearing date on the 13th day of October 1702, to secure the payment of £123, 6s. 4d., conveyed the same to *Richard Colegate*, who, in the Provincial Court of the April term 1705, recovered judgment in ejectment for the said mortgaged premises against said *Hurst*; but no

writ of *habere facias possessionem*, as far as the record discloses that fact, appears to have issued thereon. The institution of this action of ejectment to April term 1704, by *Colegate* against *Hurst*, is evidence that *Hurst* was, at that time, in possession of the mortgaged premises; as had they, at that time, been in the possession of any other person, the judgment could have been of no avail to the plaintiff. And the declaration describes the mortgaged premises sued for as late in the tenure or occupation of *James Todd*, of the aforesaid county, planter. Thus confirming, as to *Todd's* possession, the previous certificate of the surveyor of *Baltimore* county.

In March, 1749, *John Hurst*, in consideration of £5, conveyed to *Thomas Sheridine* and *Thomas Sligh*, as joint tenants, the same lands conveyed to him by *James Todd*. And on the 15th of November, 1750, in consideration of £100 sterling, *John* and *Thomas Colegate*, devisees of *Richard Colegate*, conveyed the same lands to said *Sheridine* and *Sligh* in joint tenancy. Whether the possession continued in *Hurst* till his conveyance to *Sheridine* and *Sligh*, or had previously passed from him to the *Colegates*, in this question of presumption of a deed, is of no importance; the plaintiff deducing a regular paper title from both, the possession of either is equally available to the plaintiff. And there is not a shadow of proof that the possession was in any other person.

In June, 1756, *Thomas Sheridine*, the elder, being dead, his son and heir-at-law, *Thomas Sheridine*, conveyed the said lands to *Thomas Sligh*, reciting in part the said conveyance from said *John* and *Thomas Colegate* to *Thomas Sheridine*, the elder, and *Thomas Sligh*, and that the said *Thomas Sheridine* and *Thomas Sligh*, in virtue of the said conveyance, were jointly "seized and possessed" of the said lands, and that his said father died "so seized and possessed, living the aforesaid *Thomas Sligh*," "who now continues, as survivor, seized, and yet is actually possessed of the aforesaid lands." For falsely making such a recital, *Thomas Sheridine*, the younger, as far as the record discloses, could have had no conceivable motive.

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The extract from the debt books is evidence that *Thomas Sligh*, in 1754, was in possession of 100 acres, part of *Mountenay's Neck*; and the extract from the rent roll, given in evidence by the defendants, shows that in 1756, if not before, *Thomas Sligh* and *Thomas Sheridine* were stated by the rent roll keepers of *Baltimore* county, to be the possessors of 200 acres of *Mountenay's Neck*. And the said extract from the debt books show, that from 1755 inclusive, till the year 1759, when he conveyed a part thereof to *Thomas Hammond*, (under whom the plaintiff claims,) *Thomas Sligh* was possessed of the said 200 acres, part of *Mountenay's Neck*. For a period then of sixty years, that is, from 1698 to 1758, the plaintiff has shown a continuous possession in those under whom she claims title. A stronger case for presuming a deed, on the ground of possessions of an ancient date, has rarely occurred in a court of justice.

But it is said that possession is a matter of fact which must be proved by the same kind of testimony requisite for the proof of any other fact or occurrence. To this proposition, as applicable to the case before us, we cannot assent. If the possession relied upon were of modern date, so that it might fairly be presumed as susceptible of proof by living witnesses, then would the objection urged present itself with imposing force. But as to the possessions in question, they are of so great antiquity, that the brevity of human life demonstrates that such testimony cannot be obtained. If the certificate of the surveyor be not evidence in this case, upon what principle is it that entries in the debt books are evidence to prove ancient possessions of lands? And if the recitals, in these deeds, as to possessions, be not evidence, upon what principle is it that you admit hearsay evidence of ancient boundaries or runnings of the lines of old tracts of land? Or, how is it that you admit entries made in the books of a third person by the person whose duty it was to make them, and to whom no inducement to have made false entries could be imputed? In *Mima Queen and child vs. Hepburn*, 7 *Cranch*, 290, the Supreme Court decided that hearsay evidence is incompetent to establish any



specific fact, which is in its nature susceptible of being proved by witnesses who speak from their own knowledge. But what must we presume would have been their decision, if, of facts of great antiquity, resting wholly in parol, of which no written evidence can be presumed to exist, hearsay evidence should have been offered? Why, that it was competent. The recitals here relied on are all made by persons wholly uninterested in the truth or falsehood of the facts recited.

It is also insisted that the plaintiff is precluded from relying on these possessions as furnishing a presumption for a deed from *Mountenay*, or those claiming under him, to *Blunt*, because *Thomas Sligh* having, in 1758, accepted a deed of conveyance from *Edward Fell*, the plaintiff, who makes title thro' *Thomas Sligh*, is estopped from setting up a title paramount, or alleging that she derived no title under the conveyance from *Fell* to *Sligh*. If this doctrine of estoppel, as here contended for, be sanctioned, the condition of *Sligh*, and those claiming under him, is deplorable indeed. *Sligh* is as thoroughly estopped by the deed from *Hurst*, and also by that from the *Colegates*, as he is by that from *Fell*. Their seniority or juniority neither adds to, nor detracts from their several efficacies as estoppels. If he sets up a title under the deed from *Hurst*, the reply would be, you have accepted a deed from the *Colegates* or *Fell*, and you are estopped from asserting a title derived in any other way. If he asserts his title under the *Colegates*, the deed accepted from *Hurst* or *Fell* would present to him a barrier equally unsurmountable. And the same would be the effect of either of the deeds from the *Colegates* or *Hurst*, if his title were insisted on under the deed from *Fell*. So that having made separate purchases of the titles of three claimants, he has no title at all; but if he had taken a deed from only one of them, he might perhaps have acquired an indefeasible title. The inconsistency and injustice of applying the doctrine of estoppel to a grantee, who claims nothing under the deed which he seeks to repudiate, cannot be more strongly illustrated than when attempted to be applied to a case like the present, where it is manifest that *Sligh* never, for a moment,

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supposed, that in taking a conveyance from *Fell* he designed to relinquish and abandon all the title to *Mountenay's Neck*, which he had acquired under the deeds from the *Colegates* and *Hurst*; and to admit that thenceforth he claimed no other title to *Mountenay's Neck* than that transferred to him by *Edward Fell*. That such was not the understanding of *Edward Fell*, is apparent from the terms of the deed, which do not profess, in the usual form, to convey the land itself; but simply the right, title and interest of *Fell* therein. In taking a conveyance from *Fell*, *Sligh's* only object was to purchase his peace, or remove a cloud which overshadowed his title. The difference in the amount of purchase money paid to the *Colegates* and *Fell*, fully sustains this view of the transaction. To the former, for their title, was paid £100 sterling; to the latter, £50 current money. The deed from *Fell* to *Sligh* has performed its office, and consummated the contract between the parties. *Fell* has received his £50, and *Sligh* obtained as its equivalent the asserted claim of *Fell*. The deed between them never was designed to have any further or prospective operation; to all intents and purposes it is *functus officio*. That the distinction which we have taken, as respects estoppel, when applied to a conveyance of the land itself, and the mere interest of the grantor in the land, is well founded. See 4 *Ba. Abr.* 192, *Tit. leases and terms for years*, letter O, and the authorities there referred to, where it is stated, that, "if a man takes a lease for years, of the herbage of his own land, by indenture, this is no conclusion to say, that the lessor had nothing in the land at the time the lease was made, because it was not made of the land itself."

The true ground upon which estoppels are applied to deeds is given in the case of *Jackson, ex dem of Varick, vs. Waldron and wife*, 13 *Wendel*, 178, where it is said, that "the true principle of estoppel, as applicable to deeds, is to prevent circuitry of action, and to compel parties to fulfil their contracts; thus, a party in a deed asserting a particular fact, and thereby inducing another to contract with him, cannot, by a denial of that fact, compel the other party to seek redress, against his

bad faith, by suit; but the court will decide upon the rights of the parties, without subjecting them to the expense and delay of a new litigation; and this they will do, not on the ground of concluding the parties from showing the truth, but because the whole truth being shewn, the justice of the case is not changed." And in *Blight's lessee vs. Rochester*, 7 *Wheat.* 547, a most able exposition of the doctrine of estoppel is given by Chief Justice *Marshall*, showing that it does not or ought not to apply as between grantor and grantee, and preclude the grantee from showing a prior and superior title in the grantee, to that transferred by the deed of the grantor. The true doctrine upon the subject is also correctly stated in 4 *Ba. Abr.* 190, *Tit. leases and terms for years*, letter O, as follows: "but if such lease for years were made by deed poll of lands, wherein the lessor had nothing, this would not estop the lessee, to aver that the lessor had nothing in those lands at the time of the lease made, because the deed poll is only the deed of the lessor, and made in the first or third person; whereas the indenture is the deed of both parties, and both are, as it were, put in and shut up by the indenture; that is, where both seal and execute it, as they may and ought; for otherwise, if the lessor only seals and executes the indenture, the lessee seems to be no more concluded, than if the lease were by deed poll; for it is only the sealing and delivery of the indenture, as his deed, that binds the lessee, and not his being barely named therein, for so he is in the deed poll; but that being only sealed and delivered by the lessor, can only bind him, and not the lessee, who is not to seal and execute it. And it should seem, that such lease by deed poll binds the lessor himself as much as if it were by indenture, because it is executed on his part with the very same solemnity, and therefore it should seem, he is bound by such lease by way of estoppel."

We think the county court, therefore, *erred* in granting the plaintiff's *first* prayer in the *third* bill of exceptions.

The *second* prayer of the plaintiff, in the *third* bill of exceptions, involving in it the decision of most of the defendants'



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prayers, we will forbear to express any opinion upon it till we have disposed of the defendants' prayers.

The plaintiff's *third* prayer in this bill of exceptions calls on the court for an instruction to the jury, that if, in addition to the facts stated in the first and second prayers, they also believe, "that the plaintiff, and those under whom she claims, have been in possession of the part of said property, by having a house erected upon it, and by the actual enclosure of a board fence, then the defendants cannot avail themselves of any title from presumption, except of such part as they can prove that they have also been possessed of, by actual enclosure, for twenty years, next before the impetration of the writ in this cause." And this prayer, we think the county court ought to have granted, if it be assumed that, but for such presumption, the plaintiff is entitled to the property in controversy. The general principle being now too well established to require the adduction of authorities in its support, that a *possessio pedis* of part of a tract or parcel of land, by him, who is legally entitled to the entirety, carries with it the possession to the extent of his legal rights: and no wrong-doer can, in contemplation of law, by entry or the exercise of acts of ownership thereon, acquire the possession of any part thereof, but by actual enclosure, or ouster, actual or presumptive. But such an assumption of title in the plaintiff cannot be made, as we shall hereafter show, and therefore the prayer was properly rejected by the court.

The instruction required by the plaintiff's *fourth* prayer was, "that the defendants in this case cannot avail themselves of the benefit of a grant to them for the property in dispute, unless they show by strong proof, a continuous and uninterrupted possession thereof for twenty years, next before the institution of this suit." This prayer, we think, the county court erred in not granting. Uninterrupted, continuous possession is essential to the presumption of a grant, and by "strong proof," was meant nothing more than such proof as would satisfy the jury of the existence of the fact, for the establishment of which it was offered.

The *fifth* prayer was, "that there is no evidence in this case to prove such possession." The object (the meaning) of which proposition was, that the evidence before the court was not sufficient to authorise it in instructing the jury to presume a grant to the defendants. After a minute and thorough examination of all the facts in the case, and of the law which applies to them, we are of opinion, that this instruction ought to have been granted. The grounds, upon which rest the presumption of a deed, are, that the rightful owner has so long submitted to acts of ownership over his property exercised by another, without ever having sued for the recovery of his property, or of damages for the unlawful invasions of his rights, that he is presumed to have granted them to him by whom the acts of ownership are exerted. Let us now see how far this presumption is applicable to the case before us, and ought to be insisted upon by the present appellant. To do this, we must bear in mind that the property, of which it is sought to deprive her, was not at the time of the alleged encroachments upon her rights, her freehold, or any tangible or visible property, or a franchise, or easement, of which she then had the capacity of enjoyment. It was a mere privilege of acquiring property by its reclamation from the water, and until reclaimed she had no property; no possession; no right which could be violated or encroached upon by any body. *Inloes'* fence, which from its duration is the only trespass or possession relied on as the basis of this presumption, it must be borne in mind, was erected in navigable water, and far without the limits of the land owned by the appellant. What action could the plaintiff, or those under whom she claimed, have maintained on account of the erection of *Inloes'* fence? Ejectment would not lie, there being no title in the land. Trespass, in which the law implies an injury, whether sustained or not, could not have been maintained, by reason of the want of ownership of soil, whereon the fence was erected. An action on the case could not be supported, because the gist of such action is actual damage or loss to the plaintiff; and the erection of *Inloes'* fence, so far from inflicting damage or loss, conferred a sub-

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stantial benefit, by aiding in the consummation of what was indispensable to the fruition of the valuable franchise with which the plaintiff had been invested by the laws of the State and ordinances of the city of *Baltimore*. Upon what principle then of reason, justice, common sense, or analogy, can this doctrine of presumptive grants be applied to the case now before us?

But the nature and extent of the interest acquired by improvers, under the act of 1745, ch. 9, and the state and condition in which the improvement must be, before any right of property vests in the improver, under the Act of Assembly, does not now, for the first time, arise in this court. The decision in the case of *Giraud's lessee vs. Hughes and al*, 1 *Gill & John*. 251, unless overruled, is decisive, in the plaintiff's favor, of the question we are now considering. There, *Christopher Hughes* being the owner of the land running to the water, the defendants, on whom his interests devolved, claimed title to the land in dispute, as being an improvement made by his tenant, under the acts of 1783, ch. 34, and 1745, ch. 9; and proved that his said tenant had, in pursuance of the provisions of said Acts of Assembly, made the said improvement (which was a wharf,) so far as to enclose the same, by the necessary logs, in 1789, and had the wharf filled up in the middle and north side thereof, and partly so on the east and south parts of the same; but that the logs of the said wharf, so made, had, "by injuries and decay in several parts, fallen down, (the top log entirely around,) and have not been repaired since: that part of the ground, filled up within the logs, had been, and still is, used and occupied as a distillery of turpentine; and that the water flows all round over the logs of said wharf, and within the same, from ten to twenty feet, according to the state of the tides." That in 1789, his said tenant having moved off, the said *Christopher Hughes* took possession of the premises, and by himself, his tenants, and the defendants, his heirs-at-law, held the said wharf ever since, till the trial of the cause in 1828. In that cause, the Court of Appeals decided, that, in order to vest any title in the wharf, it



must be completed; and that by reason of such incompleteness of the improvement, neither *Christopher Hughes*, nor his tenant, had acquired any title thereto, under the said Acts of Assembly. Without overruling this decision, can it, for a moment, be contended that *William Inloes*, by erecting and keeping up a straight line of fence, in the manner described by the testimony in the case before us, acquired a title to the property now in controversy? And if so, to what extent does this extraordinary fence confer title on its owner? Does it vest in him all filling up that may be caused by it, either immediately or remotely; to the north or to the south; to the east or to the west? Nay, it is relied on, as not only giving title to *William Inloes*, but to all the other defendants, who hold their lots by separate leases, wholly unconnected with, and independently of, *William Inloes*. Upon what ground this reliance is placed, it would be difficult to conjecture. If, in virtue of this fence, a deed is to be presumed to *Inloes* from the owner of the water rights of *Mountenay's Neck*, (which rights, the raising of the present question of course concedes,) then is he entitled to the entire improvement, in dispute, to *Lancaster* street, to the utter exclusion of his co-defendants. In making this fence, *Inloes*, according to the proof, never designed to do more than extend and fill up his own lot; and upon no conceivable principle could any presumption of a deed cover more than the extension in front of his own lot, which would leave his co-defendants wholly unprotected against the claim of the plaintiff, by any presumptive bar, from ancient, continuous, adversary possessions. But suppose it were conceded, that the lines of *Mountenay's Neck* did, by their original location, embrace the land now in controversy, would that enable the defendant *Inloes* to hold it upon the principle of the presumption of a deed to him? The only ground for such a presumption rests on the construction and continuance of his fence, as stated by the witnesses. This fence, it will be borne in mind, at neither end, nor at any part of it, touched his enclosures or soil, nor was it connected with any thing, natural or artificial, which could render it an enclosure or possession of any thing more than

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the ground which the fence itself covered. In its original construction, it was nothing more than a mere trespass, and its subsequent repairs were, as well in fact as in law, but repeated trespasses. In 3 *Harr. & McH.* 621, *Davidson's lessee vs. Beatty*, the court say, that, "where a person shows title to a tract of land, as for instance, *Black Acre*, and is in possession of part, possession of part is possession of the whole." And in such a case, "where a person claims by possession alone, without showing any title, he must show an exclusive, adverse possession by enclosure, and his claim cannot extend beyond his enclosures." "Where two are in possession of a tract or a house, it is his possession, who has the right." In *Chaney vs. Ringgold's lessee and al*, 2 *Harr. & John.* 87, this court say, "when two are in mixed possession of the same land, one by title, and the other by wrong, the law considers him, having the title, as in possession to the extent of his rights." And in *Hall vs. Gittings*, 2 *Harr. & John.* 112, that "where two persons are in possession of land, the one by right, and the other by wrong, it is the possession of him who is in by right." The Supreme Court of *New York* have decided, in *Jackson vs. Camp*, 1 *Cowen*, 609, that, "entry under claim of title, is generally sufficient to constitute an adverse possession, and it is not immaterial whether the title be valid or not." "But if claim is not founded on a deed or writing, the possession is limited to actual occupancy and substantial enclosure, definite and notorious." And in *Jackson, &c., vs. Schoonmaker*, 2 *Johns.* 230, that "to make out an adverse possession in ejectment, the defendant must show a substantial enclosure, an actual occupancy, definite, positive and notorious; it is not enough to make what is called a possession fence, merely by felling trees and lapping them one upon another round the land." Upon the principles of these adjudications, how can it be contended, that simply upon the possession arising from *Inloes'* fence, you are to presume a conveyance (as far as the fence indicates, of indefinite extent,) of the land lying to the north, south, east and west of it? And such conveyance is to be presumed, not only to *Inloes* himself, but to all other

lessees, deriving distinct and independent titles from the lessor of *Inloes*. As authority against the raising of such a presumption, see the case of *Lessee of Potts vs. Gilbert*, 3 Wash. C. C. Rep. 475.

The extent to which lot owners may make their improvements, in reference to each other, under the act of 1745, cannot, at this time of day, be a subject for contest. In *Dugan and al vs. The Mayor and City Council of Baltimore*, 5 Gill & John. 367, this court declared that this Act of Assembly vests, in the improver, no title to improvements not made pursuant to the provisions thereof. That "the improvements, authorised and encouraged, were those made by improvers in front of their own lots, not of their neighbors. The legislature never designed such an invasion of the rights of private property; nor, indeed, had they the power to legalise it, if such had been their design." A similar construction had been previously given to the act of 1745, in *Harrison vs. Sterett*, 4 Harr. & McH. 550.

The right of extending her lot, or wharfing out to the city dock, under the act of 1745, and the ordinances of the city of *Baltimore*, was a franchise; a vested right, peculiar in its nature; a *quasi* property, of which the lessor of the plaintiff could not lawfully be deprived, without her consent. And if any other person, without her authority, made such extension, no interest or estate in the improvement vested in the improver, but it became the property and estate of the owner of the franchise. The fact that the improvement was made by the city officers or agents, and paid for by the defendants, does not at all vary the case, or change the relative rights of the parties, as was correctly decided by this court in the case of *Wilson vs. Inloes*, 11 Gill & John. 351.

On the part of the defendants, it has also been contended, that *Mrs. Casey*, and those under whom she claimed, having stood by and seen *Inloes* expend his money in erecting his fence and repairing the same, on the property now in dispute, and giving no notice of her or their title to the same, are ever after precluded from asserting their rights to the prejudice of *Inloes*,



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and those claiming under him. But there is no ground for such a defence in this case. The plaintiff's right to the privilege in controversy, must be presumed to have been as well known to *Inloes*, as to the plaintiff, and the giving of notice would have been an act of supererogation. The true doctrine applicable to such cases, was decided by the court in the case of *Gray vs Bartlett*, 20 *Pick.* 186, that where one stands by and sees another laying out money upon property, to which he himself has some claim or title, and does not give notice of it, he cannot afterwards, in equity and good conscience, set up such claim or title, does not apply to an act of encroachment on land, the title to which is equally well known, or equally open to the notice of both parties; but the principle applies only against one, who claims under some trust, lien or other right, not equally open and apparent to the parties, and in favor of one who would be misled or deceived by such want of notice.

The *sixth* prayer asks the court to instruct the jury, "that the defendants cannot be allowed to avail themselves of any possession, so as to defeat the title of the plaintiff, further than such possession is located on the plats in this case." And in refusing it, we think there was error: it being a well established principle of the ejectment law of *Maryland*, that where defence is taken on warrant, all possessions, whether relied on to prove title, for illustration, or to disqualify witnesses examined on the survey, must be located on the plots in the cause.

In refusing the *seventh* prayer of the plaintiff, (which is, "that the acts and possession of any one of the said defendants, cannot avail the other defendants, by affording to them the benefit of a presumption of a grant,") we think the county court also erred. There is no evidence to shew any possession in any person, under whom two or more of the defendants claim to derive title; but on the contrary, they all claim title under separate and independent leases. There is no privity of any kind between them. They all possess distinct rights of extending their respective lots into the water. How then can the presumption of a grant, founded on the long continued

possession of the owner of one lot, enure to the benefit of the owner of a separate and distinct lot, of which no such possession had ever been held?

We approve of the county court's refusal of the *eighth* prayer, "that before the jury can find a title in the defendants, or any one of them, by presumption of a grant from the plaintiff, or those under whom she claims, they must believe in their conscience, and find as a fact, that such grant was actually made." The granting of such a prayer would have had a tendency to mislead the jury, by inducing them to believe that the presumption of a grant could not be made, unless the jury, in point of fact, believed in the execution of the grant; whereas, it is frequently the duty of the jury to find such presumption, as an inference of law, although in their consciences they may disbelieve the actual execution of any such grant.

The *ninth* prayer was properly refused, not only for the reason we have stated in support of the refusal of the *eighth* prayer, but because it confined the jury to the finding of a deed executed by the plaintiff herself, and would have precluded them from finding, if the proof had warranted it, a deed from any of the grantors, under whom she might claim.

The *tenth* prayer, we think, ought to have been granted for the reasons stated by us in the consideration of the court's refusal of the *fifth* prayer.

The *eleventh* prayer also, the county court should have granted. The possessions of the defendants on the east side of *Caroline* street, not interfering with or being adverse to any of the rights of the plaintiff, or those under whom she claimed, could form no basis for the presumption of a deed for the property in dispute, which lies wholly on the west side of *Caroline* street. That the title of the rightful owner, in a case of mixed possession, (which is the most favorable condition in which the defendants can be regarded,) cannot be barred "by adding together the different possessions and acts of the defendants, at long intervals, in point of time, so as to make out twenty years," is a principle too well settled to require a reference to authorities to sustain it. Upon every discontinuance

of the possession of the wrong-doer, by operation of law, the possession of the rightful owner is restored: and nothing short of an actual, adverse and continuous possession for twenty years, can destroy his rights, or vest a title in the wrong-doer.

The *twelfth* prayer too, we think, should have been granted, as well from the nature of the plaintiff's rights, to which the statutory bar is attempted to be interposed, as the total insufficiency of the possession and acts relied on as constituting the bar.

The *thirteenth* prayer is as follows: "If the jury find the patents, deeds and ordinances, offered in evidence in this cause, by the defendants, and that they were so offered by the defendants to show that they had the superior, better and more ancient right to extend, fill up and improve in front of their own lots, than the plaintiff, and those under whom she claims, have in front of her lot, then no possession which has been proved in this case on the part of the defendants, or any of them, can give rise to a presumption of a grant to the defendants from the plaintiff, as the claim of a better title on the part of the defendants than the plaintiff ever had, if the jury find that such claim is wholly inconsistent, and at war with such presumption." In refusing this prayer, the county court, we think, were right for two reasons. First, because it requires the court to instruct the jury, that if the patents, deeds and ordinances were offered to shew a claim to a superior title in the defendants, then they cannot presume a deed to the defendants, because such claim is inconsistent with such presumption; although, for aught that appears in the prayer, the jury might believe, that at the date, and during the continuance of the possessions and acts of the defendants, they the defendants had no knowledge of such their claim to a superior title, and did not rely on it, but held the possession, and did the acts referred to, under a knowledge and admission of the original superiority of the title of the plaintiff, and those under whom she claims; and that the defendants claimed to hold their possession in virtue of a deed to them from the plaintiff, or those under whom she claimed. The author of the prayer doubtless



designed that the court's instruction should have been given upon the assumption that the possession and acts of the defendants were the result of their claim of original superiority of title, but such was not the state of facts, on which the instruction was refused by the court. And secondly, we approve of the court's rejection of this prayer, even if it had been presented upon the statement of facts, on which, we presume, it was designed to have been based. When a court, as an inference of law, arising from proof of possession, directs a jury to presume a deed, it is done, upon the principles of public policy, for the protection of ancient possessions, not upon the ground that it believed that the deed presumed ever had an existence in point of fact, or that the party relying on such possession, either at its commencement, or during its continuance, claimed to hold under any such deed, or was silent as to the claim under which he held. The inference of law would be the same; the court would direct the jury to make the same presumption. All that the law requires to raise the presumption, is, that the possession should have been actual, adverse, exclusive and continuous, and under claim of title. If the presumption of the deed was a matter of fact, which the jury were only authorised to find on their belief of its existence, and the evidence of possession, which was the basis of the presumption, was taken and held under claim of a distinct and different title, then it would be competent for the court to instruct the jury, that there was no evidence whereon the existence of such a deed could be presumed.

The *fourteenth* prayer was properly rejected by the court below. It called on the court to instruct the jury as to the effect of the patent of a tract of land called "*Fell's Prospect*," which was neither located upon the plots, nor given in evidence to the jury. It also asked the court's instruction to the jury, that the defendants cannot claim under the patent of "*Island Point*," as a subsisting independent patent, but they must claim, if at all, by the relation to it, of the patent of "*Fell's Prospect*;" a prayer which this court could not grant, as *Long Island* was not only granted under the alleged patent of "*Fell's*

*Prospect*," to *Edward Fell*, under which the defendants claim title, but was devised to *Edward Fell* by the last will and testament of his father *William Fell*, in 1746, to whom "*Island Point*" was granted, by patent bearing date in 1734.

The *fifteenth* prayer demanded an instruction, "that even if the jury should believe from the evidence that, *Thomas Sligh* claimed under the escheat patent of *Mountenay's Neck* to *Edward Fell*, (meaning *William Fell*,) in the year 1737, still the said *Thomas Sligh*, and those claiming under him, have a right to go back, by relation, to the original patent of *Mountenay's Neck* in 1663, and to date their title from that period." In opposition to this prayer, a variety of grounds have been strongly urged. First, it is insisted that an escheat grant creates "*feudum novum*," operating only from its date, independently and unconnected with the original grant, and that the doctrine of relation has no application to such grants; that upon the failure of the heirs of the first grantee, or the occurrence of other cause of escheat, the land vested in the Lord Proprietary, or vests in the State, since the organization of our State Government, as a part of the public demesne, and is held by the Lord Proprietary, or the State, and the escheat grantee, as if no previous grant had ever been made of it. We do not deem it necessary to examine the various authorities referred to, as shewing the character in which the Lord Proprietary or State acquires, or the nature of the interest acquired in, lands liable to escheat. Sir *William Blackstone*, in the 2nd volume of his *Commentaries*, p. 245, in speaking of the title which the Lord of a Seignory acquires by an escheat, says: "*Sir Edward Coke* considers the lord by escheat, as in some respects the assignee of the last tenant, and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus hæres*, and therefore taking by descent, in a kind of caducary succession." And in *Matthews vs. Ward's lessee*, 10 Gill & John. 451, this court have said: "In analogy, therefore, to the admitted condition of allodial property, and in conformity to the reason and justice of the thing, when the owner of real estate dies without heir,

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the State is *ultimus hæres*, and takes the property for the benefit of all." *Ultimus hæres*, of what, did *Sir Edward Coke*, or this court mean? Assuredly, of that to which the person was entitled, whose death, without heirs, created the escheat. An escheat grant, in one sense of the term, is the creation of a *feudum novum*: that is, the grantee takes the property granted, as a new *fief* or *feud*, as regards his relationship, obligations and duties to the State. And what may be said of the State, is true as to the Lord Proprietary. He takes the estate granted upon the terms specified in the grant. But what is the estate granted? What are its limits, privileges, appurtenances, and priorities? To what liens and incumbrances it may be subjected, are matters existing independently of the inquiry, whether the grant be of a *feudum novum*, *aut antiquum*. When the State acquires title to land by escheat, it is not thereby invested with that, only, which it originally granted, and nothing more or less. It is invested with all the rights, privileges, priorities and appurtenances incident to the land itself, and with which it was held by the person, by reason of whose default of heirs, it had become escheat. The State, thus succeeding to the rights of such person, takes the property subject to all liens and incumbrances imposed upon it by him, or those under whom he derives title. And the escheat grantee, upon the terms specified in his grant, takes the estate granted, in the same condition in which it may have devolved on the State, except so far as it may be affected by the doctrine of merger or extinguishment.

To prove that an escheat grant does not relate to the original grant, and pass to the escheat grantee all that passed to the original grantee, and which was held by him, whose death, without heirs, occasioned the escheat, no authority has been referred to. And that the reverse is the well settled law of *Maryland*, appears by reference to the case of *Hall vs. Gittings*, 2 *Harr. & John.* 112, where the court say: "An escheat grant relates to, and operates to pass, the whole of the original tract escheated." And to the case of *Howard vs. Moale*, 2 *Harr. & John.* 250, where "the court refused to direct the jury, that



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an escheat grant did not include any land included in the original grant, except the same was included within the metes and bounds of the escheat grant, as particularly described; and that the escheat grant did not, by legal operation, convey all the land included within the original grant, unless the particular metes and bounds of the escheat grant did also include the same:" and said that "a grant for escheat land will relate back to the original grant." And that "an escheat certificate and grant do, by operation of law, relate to the original tract, and is strictly within the principle and rule of law of relation between grants and certificates." The same doctrine will be found in *Dorsey on Ejectment*, 78.

But it is insisted on the part of the appellees, that, conceding *Mountenay's Neck*, the original, to have carried with it the title to the property now in controversy, by the escheat grant to *William Fell*, of "*Island Point*," in 1734, this title or franchise was granted to *William Fell*, and became appurtenant to *Island Point*, under whom the appellees claim. Without inquiring whether, under any state of circumstances, such could be the effect of the escheat grant of *Island Point*, let us see whether such could be the construction of that grant, even conceding, that in terms it had embraced land included within the limits of *Mountenay's Neck*. The appellees first insist, that although it should be conceded that *Mountenay's Neck* was not liable to escheat in 1734, when the patent for "*Island Point*" issued; yet, that the Lord Proprietary is estopped from denying that it was so escheatable, and that whether then escheatable or not, is a matter of no importance, as the grant passed the contingent or possible right of acquiring the property by escheat, which right was then in the Lord Proprietary. And in support of the latter proposition, the case of *Bladen's lessee vs. Cockey*, 1 Harr. & McHen. 230, has been referred to, as shewing that the relation of an escheat grant to the original grant, shall not defeat an intermediate grant, including the lands contained in the original grant. In the regular report of that case, no such question appears to have been decided by the Provincial Court or Court of Appeals. But the reporter

appends "a note of *Samuel Chase, Esq.*, then a practising attorney or the Provincial Court," stating, "it has been determined that the relation of an escheat to the original certificate, shall not defeat mesne lawful grants. This was the case of *Bladen's lessee vs. Cockey*, (about October 1776,) the substance of that case was as follows: a tract of land called "*Carse's Forest*," was originally granted to *Robert Carse*, in 1696. It was granted to *George Stewart* as escheat in 1746. In June, 1721, the same land was granted to *John Cockey*, by the name of "*Cockey's Folly*." The question was, whether the grant to *Cockey* in 1721, was not an elder title than the escheat grant to *Doctor Stewart* in 1746, under whom *Bladen* claimed. Whether "*Carse's Forest*" was escheatable in 1721 or not, does not appear. If it were, then was the decision, imputed to the Provincial Court, in perfect accordance with subsequent decisions in this State upon like questions. But if the fact were otherwise, then must we express our decided dissent from this alleged decision of the Provincial Court. Until the occurrence of the event which constitutes the escheat, the interest of the Lord Proprietary, in relation to it, was a mere possibility, and could not be the subject of a grant. Such in effect was the decision in the case of *Partridge's lessee vs. Colegate*, 3 Harr. & McHen. 340. And in *Hall vs. Gittings*, 2 Harr. & John. 112, the court say, "escheat is that possibility of interest which reverts to or devolves on the Lord, upon failure of heirs, of the original grantee, and he cannot grant the land again until that event happens; and if he does, his grant will pass nothing:" and land not liable to escheat at the time it was included in a grant on a survey made in virtue of an escheat warrant on another tract, but which afterwards became escheat, will not pass under such grant, and the State is not estopped from granting it to any other person." And in *Howard vs. Moale*, 2 Harr. & John. 250, the court decided, that "a grant of land, surveyed under a common warrant, will not pass land not then liable to escheat, but which afterwards became escheat, and as such was granted to a third person." But apart from these decisions, the inapplicability of the doctrine of estoppel

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to grants of land made by the State or Lord Proprietary, is clearly shown in *Codman and others vs. Winslow*, 10 *Mass. Rep.* 155. Such grants and patents issue upon the statement of facts made by the grantees, and the recitals and assumptions of facts, therein contained, are, in fact, but the suggestions of the grantees. In such grants or patents, nothing passes but the title which the grantor then possessed, not that subsequently acquired.

But it is urged by the appellees, that conceding the law to be, as we have stated it, that it does not apply to *William Fell's* patent for "*Island Point*," in 1734, because "*Mountenay's Neck*" was then liable to escheat, of which liability, the only evidence offered, is the escheat warrant and patent to *William Fell*, of *Mountenay's Neck*, in 1737. An escheat grant is *prima facie* evidence that the land granted is liable to escheat. But liable at what time? At the date of the issuing of the escheat warrant, and not antecedently. The escheat warrant for "*Mountenay's Neck*," which issued in April 1737, is no evidence of its liability to escheat in 1734.

Suppose, however, we are wrong in the views we have taken of the operation of the grant of "*Island Point*," in 1734, and that it passed to the patentee a portion of "*Mountenay's Neck*," or of the franchises incident to it; of what avail is it to the appellees? *William Fell*, by the patents of 1734 and 1737, being entitled to both tracts of land, and his devisee, *Edward Fell*, having, by his deed of 1758, conveyed "*Mountenay's Neck*" to *Thomas Sligh*, it passed to him, with all its appurtenances, in the same manner that it was held under the original patent of 1663. See the case of *Mundell vs. Perry*, 2 *G. & J.* 193.

As far as regards any conflict of rights between these parties, *Inloes* and the other defendants had, under the act of 1745, a right to extend westwardly, in front of their lots, to the line of the eastern end of the *City Dock*, extended northwardly; that is to say, to the west side of *Caroline* street, and no farther; and the lessor of the plaintiff had the right to extend her grounds to the *City Dock*, at the south side of *Lancaster*



street. Upon the foregoing views, this court think that the plaintiff's fifteenth prayer ought to have been granted.

The court below erred in granting the plaintiff's *sixteenth* prayer, upon the grounds stated by us in the examination of the propriety of its granting the plaintiff's first prayer in the third bill of exceptions.

We concur with the county court in their refusal to grant the defendants' *second* and *third* prayers, and dissent from its granting the defendants' *fourth* prayer in the third bill of exceptions, upon the grounds we have stated in reviewing the court's opinions upon the various prayers of the plaintiff, contained in that exception.

And we concur with the rejection of the *second* and *third* prayers for an additional reason. In those prayers, they put to the jury the finding of certain facts, none of which relate to the acquirement of title by the defendants in virtue of possession; and these prayers are predicated upon the assumption, that the defendants had shewn a clear paper title to their several lots, by means of which they assert a title to the property in dispute. But this assumption of title is wholly unsustained by the evidence before the jury. They severally claim title to their respective lots under leases from *Ann Fell*, who, by the record, is not shown to have had any title to the lots attempted to be leased. And, waiving this defect, which, of itself, is an insuperable objection to the court's instructing the jury that the defendants are "the elder riparian owners of the water lots on *Bond street*," the court could not have granted the prayer, because the only evidence to show *William Inloes* (apart from his possession,) was entitled to lot number *five*, was, that he was the heir of *Abraham Inloes*, the lessee for a term of years.

The *first* prayer of the defendants, "that if the jury find that the tract of land called "*Bold Venture*," was granted as given in evidence by the defendants, and that the same is truly located on the plats in the cause by defendants, that then the patent of "*Mountenay's Neck*" gives no title to the lessor of the plaintiff to the lot of ground for which the defendants have taken the defence on the plats," we think ought to have been

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granted. "*Bold Venture*," embracing all the land between the line of "*Mountenay's Neck*," from M to N, and the City Dock, covers of course, the ground now in controversy, as effectually as if it had been fast land, at the time the "*Bold Venture*" was originally surveyed. The act of 1745, ch. 9, never was designed to give one land-holder the power of extending his improvements over the land of another. If such had been the design of the legislature, it possessed not the power of effecting it, in the mode provided by that Act of Assembly. The grant of "*Bold Venture*," though for the most part covered with water, still passes to the grantee all the soil, under the water, included within its outlines, with all the rights of property incident thereto, subject only to the rights of the public, as to fishing and navigation. If it had been encroached on by any person, as by driving of piles and erecting a wharf, or building a house thereon, an action of trespass or ejectment could have been maintained by the patentee, or those claiming under him. See the case of *Brown vs. Kennedy*, 5 *Harr. & John*. 210.

Upon the views we have expressed in relation to "*Bold Venture*," we could not do otherwise than approve of the county court's refusal to grant the plaintiff's second prayer in the third bill of exceptions.

From what we have said in relation to the three preceding bills of exceptions, it follows, that we dissent from the county court's refusal to grant the four first prayers of the plaintiff in the fourth bill of exceptions; but concur with it in its refusal of the fifth and sixth prayers of the plaintiff.

As "*Bold Venture*" bars the plaintiff's recovery as against any of the defendants, we approve of the county court's refusal to grant the plaintiff's prayer in the fifth bill of exceptions.

No ground of error has been suggested to us, and we have discovered none, in the court's admitting the testimony objected to by the defendants in the sixth bill of exceptions.

We approve of the acts of the court in the first and second bills of exceptions, and of their refusal to grant the plaintiff's second, eighth, ninth, thirteenth and fourteenth prayers, and

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the defendants' second and third prayers in the third bill of exceptions, but we dissent from the court's granting the first and sixteenth prayers of the plaintiff, and its refusal of the plaintiff's third, fourth, fifth, sixth, seventh, tenth, eleventh, twelfth and fifteenth prayers, and the defendants' first and fourth prayers in the said exception; and concur with the court in its refusal of the four first prayers of the plaintiff in the fourth bill of exceptions, and dissent from its refusal of the plaintiff's fifth and sixth prayers; and we concur with the county court in its refusal of the plaintiff's prayer in the fifth bill of exceptions, and also with its overruling the defendants' objection to the testimony mentioned in the sixth bill of exceptions.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.





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## ACCOUNT STATED.

1. Where the court perceives from the mutual allegations of the parties, and from the evidence adduced in the cause, that they had stated and settled an account between themselves, they cannot claim a decree to account. *Stiles et al. vs. Brown et al.* 350.
2. A complainant seeking to investigate ancient accounts, will have his case subjected to severe scrutiny; although he is not to be visited with all the consequences of *laches*; while on the other hand, the defendant's evidence may receive a more indulgent consideration. The time at which the claim is advanced, and a failure to prosecute it against original parties, while they were alive, are circumstances calculated to create suspicion against such a claim, and in a doubtful case strengthen the defences which the representatives of such original parties may set up. *Ib.*
3. Where the parties settle and adjust their mutual claims, and one gives the other a note for the balance due, this forecloses an enquiry into all antecedent transactions, unless upon the ground of error or fraud. *Ib.*

## ACTS OF ASSEMBLY.

1. It is the duty of courts of justice by just construction, to reconcile the various sections in an act of Assembly, to prevent that clashing interference and incongruity which ought never to be imputed to the legislature, where it is practicable to avoid it. *Beall vs. Black*, 203.
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## JURISDICTION.

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DEED.

## ASSIGNOR AND ASSIGNEE.

1. By the act of 1829, ch. 51, any assignee, *bona fide* entitled to any judgment, bond, speciality, or *other chose in action for the payment of money*, by assignment in writing, signed by the person authorised to make the same, may by virtue of such assignment sue and maintain an action, &c., in his name, &c. against, &c. **Held:** that an instrument of writing which bound the defendant to pay a money rent, let a third party have a portion of the produce of the demised premises, and furnish the means of carrying it away, was not such an instrument, as under that act, would authorise an assignee to maintain an action in his own name. *Gordon vs. Downey*, 41.
2. The chose in action contemplated by the act of 1829, ch. 51, was one



ASSIGNOR AND ASSIGNEE—*Continued.*

- purely for the payment of money ; and where the assignor, if no assignment had been made, could only maintain an action for non-payment of the money. *Ib.*
3. But where money is due under such a contract and the defendant, promises the assignee to pay the same, this will enable the assignee to sue independent of the act of 1829, ch. 51, upon the express promise. *Ib.*
  4. A party for whom a sum has been levied, in the county levies, may make a valid transfer thereof without writing. *Baden et al vs. State use of Clark*, 167.

## ASSUMPSIT.

1. A testator devised a sum of money to his two grand-daughters, as and for their absolute property, to be taken and set apart for that purpose, out of his personal estate, and paid them as soon as conveniently may be done after his decease ; the same to be understood as bequeathed unto them as their property respectively, and not to either of their respective husbands or their father, nor their step-brothers or step-sisters. The sum devised to one of the females was demanded by her husband from the executors, and paid over to him by them upon a special agreement. In an action brought by the legatee, against the administrators of her deceased husband, to recover the money received by him, **HELD** : that it was not material whether the will gave her an absolute or a separate estate, and that her rights must depend upon the validity or invalidity of the agreement, in virtue of which the money was paid over to her deceased husband. *State use of Stevenson vs. Reigart*, 1.
2. A contract founded upon an equitable duty, such as would be enforced by a court of equity, or upon a moral obligation which no court of law or equity can enforce, or to do that which an honest man ought to do, or upon the waiver of a legal right by the party entitled to it, is maintained by a sufficient consideration. *Ib.*
3. The chose in action contemplated by the act of 1829, ch. 51, was one purely for the payment of money ; and where the assignor, if no assignment had been made, could only maintain an action for non-payment of the money. *Gordon vs. Downey*, 41.
4. But where money is due under such a contract, and the defendant promises the assignee to pay the same, this will enable the assignee to sue independent of the act of 1829, ch. 51, upon the express promise. *Ib.*
5. The plaintiff, upon the sale of a horse by him, promised the defendant, the purchaser, to obtain a certificate from the breeder, that the animal was thorough bred, and send it to him. In an action to recover the amount of a note given for the purchase money, the defendant prayed the court to instruct the jury that the plaintiff could not recover, unless the jury should find that the horse was thorough bred, which the court refused, and instructed the jury that the plaintiff could not recover unless he furnished the promised certi-

ASSUMPSIT—*Continued.*

- ificate within a reasonable time from the making of the contract. This was affirmed upon appeal. *Mulliken vs. Boyce*, 60.
6. Upon the sale of a horse, the seller agreed to furnish the buyer with a breeder's certificate that the horse was thorough bred. The latter accepted the animal, and retained him without any offer to return him. In an action upon a note for the purchase money, though the plaintiff had failed to furnish the promised certificate, he may still recover the actual value of the horse sold. *Ib.*
  7. The conveyance of land, delivery of possession in pursuance of a deed, or in other words, the execution of the contract on the part of the plaintiff, as vendor of land, raises a duty on the part of the vendee to pay the consideration money, which will sustain the judgment of the court. *Wolfe vs. Hauver*, 84.
  8. The law equally implies a promise to pay for land sold and delivered, as it does in the case of the sale of goods, wares and merchandise. *Ib.*
  9. A defendant who places his defence upon the finding by the jury, "that the compensation claimed by the plaintiff of the defendant, was, according to the agreement of the parties, to be paid out of the estate of C, in the hands of the defendant's testator," cannot ask the court to instruct the jury, that his testator was not personally liable, though the compensation had not been paid. The failure to pay out of C's estate was a breach of the contract, for which the testator was personally liable. *Calvert vs. Cox*, 95.
  10. In an action to recover compensation for professional services, the defendant placed his defence upon the finding by the jury, that a sum certain paid to the plaintiff, "was, according to the contract between the parties, to be paid upon the contingency of the final decision of the cause in favor of C's will," and if they so found, then the plaintiff was entitled to no additional compensation. At the time of making the contract, the law did not authorise, but shortly after the verdict in the will cause, an act was passed, which did authorise an appeal in such cases; services were rendered upon an appeal, and subsequently upon the reversal of the first judgment. The compensation first agreed upon had been paid between the time of rendering the verdict and the passage of the act authorising an appeal; **Held**: as there was other evidence tending to show, that by additional or subsequent agreement, the defendant's intestate promised to pay the plaintiff a further compensation, that question was open for the consideration of the jury. *Ib.*
  11. An instrument of writing in the following words, viz: "we hereby bind ourselves to pay W. all that we receive over \$400 of the C. and O. C. company in our cases against said L. and M.," signed by the defendant, does not *per se* contain evidence of a consideration.—*Keefer vs. Mattingly*, 162.
  12. But the connexion of this paper with other proof leading to the inference, that the plaintiff in the action had forborne to defend cer-

ASSUMPSIT—*Continued.*

- tain actions depending at the time of its execution, and in consequence of, and reliance upon it, allowed judgments to be rendered, is sufficient evidence of a consideration for its execution, proper to be left to the jury. *Ib.*
13. L assigned to M his claim against the C. and O. C. company. At this time K had an attachment pending against the funds of L, in the hands of the company, and shortly afterwards agreed to pay M all sums he should receive over and above the sum of, &c. In an action by M against K to recover such surplus, the assignment from L to M is admissible evidence, as a basis for the introduction of the agreement between M and K, and calculated to explain the reasons for that agreement. *Ib.*
  14. Implied from obligation of law to perform a duty to the public. *See* MAYOR & C. C. OF BALTIMORE.
  15. Z. sold to W. a tract of land, gave him a bond of conveyance, and received his promissory note signed by him, *first* in his own name, and *secondly* as agent for the S. M. Company. The latter was a manufacturing institution, and required land for its operations. The note not being paid, Z. brought his action against both; the Company only appeared; the declaration counted upon the note. The proof showed that the agent was the general agent of the Company; had bought other land for the use of the Company which it retained and paid for, and that the agent was in the habit of signing its notes as agent, which were paid by the Company. **HELD:** that the bond of conveyance was the only legal evidence of the nature and character of the contract, and that the purchase was made by W. on his own account; and as the Company was not authorised to become surety by its charter, the note was a nullity. *Worthington vs. Savage Man. Co.* 284.
  16. A testator devised his slaves, in trust, to be manumitted as they severally arrived at the age of forty years, or immediately upon his real estate devolving on his grand nephew, should it come to his hands; and, *in trust also for the term they have to serve*, for the use of his wife and any child he may have by her, for and during the term of her natural life, and after her death for the use of any child that may survive her. By a codicil he revoked "that part of my will which manumitted my servants as they severally arrived at the age of forty years, and devised them to his wife, for and during her natural life, and *after her death* then said servants to be free; but in case that any of said servants shall runaway, and afterwards be apprehended, they shall forfeit their freedom and be sold for life." After the testator's death some of the servants ran away, and were sold by the widow as slaves for life. The trustees under the will claimed the proceeds for the purpose of investment, and brought an action at law, (in which all errors of pleading were waived,) to recover them. **HELD:** that the widow was entitled to the fund absolutely. *Jones vs. Earle Ex. of Jones*, 395.



ATTACHMENT TO COMPEL APPEARANCE OF A DEFENDANT  
AT LAW.

1. After a judgment of condemnation has been rendered in an attachment cause, if the defendant desires to move to quash the writ, regularly he should first move to strike out the judgment, and then make his motion to quash. *Boorman vs. Israel & Patterson, Ex'rs*, 372.
2. Without the short note showing the plaintiff's cause of action, and the issuing thereon of a *capias ad respondendum* or a summons, (as the case may be,) the proceedings in an attachment would be wholly irregular. *Ib.*
3. Nothing ought to be recovered by a condemnation of the property attached which was not recoverable from the defendant, had he given special bail, and appeared to the process issued against him. *Ib.*
4. Where the short note states a cause of action in *assumpsit*, and the writ issued was in trespass upon the case, matters for which debt or covenant was the only remedy could not be recovered. *Ib.*
5. A short note cannot be amended from *assumpsit*, to debt or covenant, where the writ is in trespass upon the case. *Ib.*
6. It is no ground for quashing an attachment that some specific portions of the claim as made could not be recovered under the short note. *Ib.*
7. Where the creditor deposes "that he is credibly informed, and verily believes, that the said J. B. (the debtor) has removed from his place of abode with intent to injure and defraud his creditors," this is a sufficient compliance with the act of 1795, ch. 56, sec. 1, in that particular. *Ib.*
8. A judgment on attachment which not only condemns property towards satisfying that portion of a plaintiff's demand which might be recovered under the short note, but also to satisfy that which could not be so recovered, is erroneous. *Ib.*
9. Where the plaintiff exhibits a claim for principal, and with interest added, up to a given day, it is error in the county court to enter up a condemnation for the gross sum as bearing interest from the day on which the attachment issued. The charge of interest upon the interest was not warranted under such circumstances. *Ib.*
10. Under the act of 1795, ch. 56, sec. 1, unless the affidavit of the creditor contain an averment of citizenship as to both creditor and debtor, no attachment against an absconding debtor can lawfully issue. *Ib.*
11. The act of 1834, ch. 76, sec. 1, dispensed with the averment of citizenship of the plaintiff; *provided*, that if any trial take place it be proved that the plaintiff or plaintiffs, or any of them, at the time of issuing the attachment was or were a resident or inhabitant, or residents or inhabitants, of one of the United States of America, or of a District or Territory thereof. *Ib.*
12. But where the affidavit is designed to procure a warrant for an attachment against the effects of an *absconding debtor*, under the act of 1795, and does not contain an averment of his citizenship

# ATTACHMENT TO COMPEL APPEARANCE OF A DEFENDANT AT LAW—*Continued.*

of *Maryland*, it is substantially defective ; and upon an appeal from a judgment of condemnation rendered upon it, without a motion to that effect in the county court, the judgment will be reversed and the attachment quashed. *Ib.*

## ATTORNEY AT LAW.

1. The common law of *England*, in relation to fees of counsellors at law, is inapplicable to the *State of Maryland*. In a *quantum meruit*, they may recover for professional services rendered. *Calvert vs. Coxe*, 95.

## BILL OF EXCEPTIONS. *See PRACTICE*, 12.

*See PRACTICE IN APPELLATE COURT*, 6, 7.

## BILL OF PARTICULARS. *See PLEAS AND PLEADING*, 11.

## BILL OF RIGHTS. *See CONSTITUTIONAL LAW*.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A party may waive the privilege of claiming notice of protest, as he may any other right which the law has secured to him. *Whiteford vs. Burckmyer & Adams*, 127.
2. Under an allegation of notice of protest to an endorser in the declaration, the plaintiff may show a waiver of the right by the defendant. *Ib.*
3. The necessity for plain and satisfactory proof as to the *time of service* of notice of non-acceptance, where that is material, has always been insisted on ; it may be proved by circumstantial testimony, but the circumstances must point *not to notice at some time*, but to notice on the day when the party had a right to expect and receive it. *Ib.*
4. Where the holder of a bill of exchange, in *Baltimore*, sends it to a distant place, as *Charleston, S. C.*, for acceptance, and it is not accepted, the plaintiff, in an action against an endorser, must show presentment for acceptance and refusal, and notice duly transmitted from *Charleston* to the endorser, by mail, or if the notice to the endorser was sent by mail to the holder in *Baltimore*, that he delivered it within one day after the arrival of such notice in *Baltimore*, and the burthen of proof is on the plaintiff to show such notice given. *Ib.*
5. Where the entire and exclusive interest in a bill is vested in the holder thereof, he cannot institute an action upon it in the name of another party. *Ib.*
6. Possession of a note endorsed in blank will enable the party having it to maintain suit, except *mala fides* be proved. *Ib.*
7. Courts of justice will never enquire in such cases, whether a plaintiff sues for himself or as trustee for another, nor into the right of possession, unless on an allegation of *mala fides*. *Ib.*
8. Blank endorsements may be filled up at the moment of trial. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued.*

9. If a bill has been transferred by endorsements, all of them in full, it can only be sued on by the special endorsee. *Ib.*
10. A bill payable to bearer, or a bill payable to order, endorsed in blank, will pass by delivery and bare possession, is *prima facie* evidence of title. *Ib.*
11. If an agent receive a bill with all the endorsements in full, and the last in full to his principal, the agent cannot sue in his own name, or if the endorsements are in blank, and he were to fill it up to himself or his principal, it could not be sued on in the name of a stranger. *Ib.*
12. Since the act of 1825, ch. 35, any holder with a blank endorsement may now sue in his own name, but that act cannot be construed to extend the right of action to one who has no interest in the bill, either as holder or owner. *Ib.*
13. An admission of notice by a defendant, endorser, is evidence on which the jury may find notice, in due time, and in due form. *Ib.*
14. An action will lie upon notice of presentment, and non-acceptance of a bill of exchange, without waiting for demand of payment at the maturity of the bill. *Ib.*
15. The holder is not bound to present a bill payable on a certain day after date, for acceptance, unless he be an agent to get it accepted, or to collect it. If it be presented, and acceptance is refused, it is dishonored, and immediate notice must be given to the parties who are to be charged. *Ib.*
16. The act of 1837, ch. 253, was designed to extend the credit which, by the courtesy of commercial nations, had been given to the certificate of a notary public. *Ib.*
17. The certificate of a public notary had been received as *prima facie* evidence of the presentment by him for acceptance or payment, and of his protest of the bill for non-acceptance or non-payment. *Ib.*
18. The act of 1837, ch. 253, extends this doctrine as well to inland as to foreign bills or notes, as to notice sent or delivered in the manner stated in the protest. *Ib.*
19. It is not necessary that notice of protest be sent by mail, and a party is not bound to be more expeditious or certain than the mail. *Ib.*
20. Notice, if sent by mail, need not be enclosed to the address of the party to be charged. If it be received by him in due time, he cannot object to the mode of conveyance. *Ib.*
21. Where the protest does not show notice of dishonor transmitted to the party to be charged, that fact may be supplied by other proof. *Ib.*
22. Upon a note made in *Louisiana*, bearing ten per cent. interest until paid, this court will enter judgment accordingly. *Nelson & wife vs. Bond*, 218.
23. Where a note is executed by an agent before it is admissible in evidence, it is necessary to prove, not only his signature, but the authority by which it is made. *Worthington vs. The Savage Manufacturing Company*, 284.



BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued.*

24. Where by the terms of a charter a manufacturing company had no power to assume the responsibility of a surety, the note of such a company executed upon no other consideration than as surety, is void. *Ib.*

*See ASSUMPSIT, 6.*

EVIDENCE, 27.

## BOND.

1. A bond of conveyance which recites that the obligor did sell to the obligee, and contract and agree to grant and convey to him, his heirs and assigns, a certain tract of land, acknowledging the receipt of the cash part of the purchase money from him, with the notes of the obligee and another, for the balance thereof, and stipulating until default should be made in the payment of the purchase money, that he should hold the land sold as aforesaid, demonstrates that the obligee made the purchase on his own account, and parol evidence is not admissible to contradict it in that respect. *Worthington vs. The Savage Manufacturing Company*, 284.

## BOND OF COUNTY COLLECTORS.

*See COLLECTORS OF COUNTY LEVIES AND TAXES, 1, 2, 3, 4, 8, 9.*

EVIDENCE, 32, 33.

## CASES EXPLAINED OR OVERRULED.

1. *Bowley and Lammott*, 6 H. & J. 524 explained. *See* page 1.
2. The cases of *Wesley vs. Thomas*, 6 Harr. & John. 24; *Watkins vs. Stockett*, 6 H. & J. 435; *Betts vs. The Union Bank*, 1 H. & G. 175; *Hurn vs. Soper*, 6 H. & J. 277, were instances in which efforts were made to change the character of deeds, or to vary the consideration stated in them, and thereby either to alter their nature and character, or maintain a deed impeached for fraud, by setting up a different consideration from that stated on its face. *Wolfe vs. Hauver*, 84.
3. The case of *Lee vs. Lee and Welsh*, 6 G. & J. 316, is not in conflict with *Stevenson et al. vs. Shriver and wife*, 9 G. & J. 324. In the latter case, this court considered the *prima facie* effect of the order of the orphans court, when passed, as evidence coming in collaterally, while in the former cause the question was, whether the orphans court, acting *de novo*, ought to pass such an order at all. *Bowling and wife vs. Lamar*, 358.

## CHESAPEAKE AND OHIO CANAL COMPANY.

1. The *Chesapeake and Ohio Canal Company* has no right in cutting its canal across public highways, utterly to destroy them, and it is bound to unite, for the public accommodation, the highway thereby divided, by a reasonably convenient thoroughfare over or under its canal. *Leopard vs. Ch. & O. C. Co.* 222.
2. A deed from a party seized of land, conveying to the *C. and O. Canal Company* "such portion and quantity of his land as may be covered, used or occupied by the said canal, or the necessary works thereof," and describing the premises conveyed, is not a contract to surren-

CHESAPEAKE AND OHIO CANAL COMPANY—*Continued.*

der the privilege of using public highways which passed through the granted premises. *Ib.*

3. In construing a deed made to a canal company for the purposes of its works, the court will presume that the parties to it understood their relative rights, powers, and duties, in respect to the subject matter of their contract. *Ib.*

CITY OF BALTIMORE. *See* MAYOR AND C. C. OF BALT.

## COLLECTORS OF COUNTY LEVIES AND TAXES.

1. The single bill of a collector of the county, sealed as collector, promising to pay the equitable plaintiff in the action, a sum of money "for value received, with interest, the same being for county paper due for the year 1836-7." *HELD*: to be sufficient evidence in the absence of contradictory proof, to entitle the plaintiff to a verdict upon the bond of the collector, as well against the principal as his securities. *Baden et al vs. State use of Clark*, 167.
2. Such a bill, is an implied admission, that the obligor had collected and received the amount therein mentioned; that the same had been levied, and the levies transferred to the obligee. *Ib.*
3. Where the condition of a collector's bond was that he "shall well and truly account for and pay over to the treasurer of the State, the several sums of money which he shall receive or be answerable for by law, *at such time as the law shall direct*," it is no change or alteration of the terms of the contract, that the legislature appointed a more distant day, than the one fixed when the bond was executed, for the payment of the money collected into the treasury. *State vs. Carleton et al*, 249.
4. The granting of indulgence by law to a principal collector of the State does not discharge his sureties, though without their consent. *Ib.*
5. The legislature, at their pleasure, and whenever the interest or convenience of the State requires it, may alter the time at which the collectors of taxes are required to pay the public dues into the treasury. *Ib.*
6. The collector of taxes is regarded as an agent of the State, and where he admits the collection of taxes, he will not be heard to urge in his defence to a suit for their recovery, that the money he had received was on account of taxes which the legislature had no constitutional power to impose. *Waters et al vs. the State*, 302.
7. The question of constitutional authority to levy a tax, may arise between the collector and the person taxed, *before* payment, or *after* payment between the State and such person. *Ib.*
8. By the act of 1831, ch. 281, a board of managers was provided for, to remove free negroes and mulattoes from *Maryland* to *Liberia*. The treasurer was directed to pay them certain sums of money for the objects of their appointment, which he was authorised to borrow on behalf of the State. The 8th section of the act declared, that for

COLLECTORS OF COUNTY LEVIES AND TAXES—*Continued.*

the purpose of raising a fund to pay the principal and interest of the loans aforesaid, the levy courts, &c., were authorised annually to levy on the assessable property within their respective counties, clear of the expense of collection severally, as follows: on Montgomery county the sum of \$340.66, and so on each of the counties the specific sum mentioned in the act as to each, which said sums shall be collected in the same manner and by the same collectors as the county charges are collected, the levy court, &c., taking bond with sufficient security from each collector for the faithful collection and payment of the money in the treasury at the time of paying other public moneys, to and for the use of the State. **Held:** 1st. That as the act required another bond to be given, payable to the treasury, the legislature never looked to the bond given under the act of 1794, ch. 53, as furnishing any security for the collection of the tax imposed by the act of 1831, ch. 281. 2nd. The collector's bond taken under, and in view of the act of 1794, ch. 53, is not responsible for the tax of 1831, ch. 281. *Ib.*

9. Contracts between collectors of public money and their securities with the government, must be construed in reference to the terms used in them, and by the laws under which they were made. *Ib.*

See ASSIGNOR AND ASSIGNEE, 4.

## COMMISSION TO TAKE EVIDENCE.

See EVIDENCE, 10, 11, 12.

PRACTICE, 17, 18, 19, 20, 21, 22.

CONSIDERATION. See ASSUMPSIT, 2, 7, 8, 9, 10, 11, 12, 13.

## CONSTITUTIONAL LAW.

1. An action against husband and wife, founded on the note of the wife, made by her while sole in *Louisiana*, is not barred by her release before marriage, and after the maturity of her note, under the insolvent laws of *Maryland*. *Nelson and wife vs. Bond*, 218.
2. The legislature, at their pleasure, and whenever the interest or convenience of the State requires it, may alter the time at which the collectors of taxes are required to pay the public dues into the treasury. *State vs. Carleton et al*, 249.
3. The collector of taxes is regarded as an agent of the State, and where he admits the collection of taxes, he will not be heard to urge in his defence to a suit for their recovery, that the money he had received was on account of taxes which the legislature had no constitutional power to impose. *Waters et al, vs. The State*, 302.
4. The question of constitutional authority to levy a tax, may arise between the collector and the person taxed, *before* payment, or *after* payment between the State and such person. *Ib.*
5. By the act of 1831, ch. 281, a board of managers was provided for, to remove free negroes and mulattoes from *Maryland* to *Liberia*. The treasurer was directed to pay them certain sums of money for the objects of their appointment, which he was authorised to borrow on behalf of the State. The 8th section of the act declared, that for the



CONSTITUTIONAL LAW—*Continued.*

purpose of raising a fund to pay the principal and interest of the loans aforesaid, the levy courts, &c., were authorised annually to levy on the assessable property within their respective counties, clear of the expense of collection, severally, as follows: on Montgomery county the sum of \$340.66, and so on each of the counties the specific sum mentioned in the act as to each, which said sums shall be collected in the same manner and by the same collectors as the county charges are collected, the levy court, &c., taking bond with sufficient security from each collector for the faithful collection and payment of the money in the treasury at the time of paying other public moneys, to and for the use of the State. **HELD:**

That this tax was not laid for the support of government, but with a political view for the good government and benefit of the community, which is apparent from its provisions, and the general course of legislation on this subject. *Ib.*

6. Before a law imposing a tax of a specific sum on each county, for the support of government, can be considered as violating the 13th section of the Bill of Rights, it ought to appear clearly, that the persons taxable are not made to contribute according to their actual worth in real and personal property. *Ib.*
7. In the absence of evidence, this court is bound to presume, that such a tax was laid according to the provisions of the Constitution, and that the legislature may have divided it among the counties, according to the valuation of property in such local jurisdictions, and had such evidence before them as guided their judgment in that particular. *Ib.*

## CONSTRUCTION—

Of Deeds. *See* DEEDS, 5.

Agreements. *See* ASSUMPSIT, 11, 12, 13.

Collectors Bonds. *See* COLLECTORS OF COUNTY LEVIES AND TAXES.

## CONSTRUCTION OF STATUTES.

1. Acts of Assembly made relative to the administration of justice are to be liberally construed for the attainment of that important object. *Mitchell vs. Mitchell*, 66.
2. It is the province of courts of justice to expound laws and not to legislate. *Ib.*
3. It is the duty of courts of justice by just construction, to reconcile the various sections in an act of Assembly, to prevent that clashing interference and incongruity which ought never to be imputed to the legislature, where it is practicable to avoid it. *Beall vs. Black*, 203.

CONTAGIOUS DISEASES. *See* MAYOR AND CITY CO. OF BALTIMORE.

## CONTRACT.

1. Where the parties entered into a contract, to construct a road between two given points, which from its nature was an entire indivisible contract, and afterwards entered into another agreement for the per

CONTRACT—*Continued.*

formance of the same work, either in part, or in the whole, at a different price, the latter is an extinguishment of the first contract. *Howard vs. Wilmington & Sus. R. R. Co.* 311.

2. Where an entire contract is extinguished in part or in the whole, an action on the contract itself cannot be sustained. *Ib.*
3. Where an entire contract is extinguished in part or in whole, by the making a new one for a part of the subject matter of the first, it is not sufficient for the plaintiff, who seeks to recover damages for a violation of the original agreement, and to repel the legal presumption of a merger in such a case, to aver that *he* entered into the *second* contract with an express understanding on *his* part, and so declared to the defendants at the time, that the *first* contract was not waived, except so far as it was covered by the second; but the fact of assent by the other party should have been also averred. *Ib.*
4. The legal presumption of a merger, as where two contracts are successively entered into upon the same subject matter, is not to be repelled by evidence of the silence of one party, but assent of parties must be averred and proved, to prevent such presumption from operating. *Ib.*
5. Whether parol evidence of such assent would be received to vary the effect of the second contract upon the first, both being in writing. *QUIRE? Ib.*
6. Where a contract has been vacated and rendered legally inoperative in part by the consent of the plaintiff, no action can be sustained upon it for the recovery of damages on the ground, that the plaintiff's was prevented by the wrongful act of the defendant from fulfilling it. *Ib.*
7. Where an original contract has been rescinded by the parties after it has been performed in part, either by a waiver of the performance of the balance of the contract, or entering into a new one so inconsistent with the first as to be wholly irreconcilable with it, in such case a recovery may be had for the part performance on a general count; but not by declaring on the contract itself. *Ib.*

*See ASSUMPSIT.*

PLEAS AND PLEADING.

CONVEYANCES. *See DEEDS.*

## CORPORATIONS.

1. Where by the terms of a charter a manufacturing company had no power to assume the responsibility of a surety, the note of such a company, executed upon no other consideration than as surety, is void. *Worthington vs. The Savage Man. Co.* 284.

## COUNTY COURTS.

1. In an action against an innkeeper, for negligently taking care of the plaintiff's horse in his stable, so that he was killed, the damages claimed exceeded fifty dollars. *Held:* that the county court had jurisdiction of the action. *O'Reilly vs. Murdoch*, 32.

COUNTY COURTS—*Continued.*

2. Under the act of 1835, ch. 201, the county court has jurisdiction in an action on the case, for overflowing the plaintiff's land, by reason of obstructions suffered to remain in defendants' mill-race, where the damages laid were above one hundred dollars, though the verdict was for a less sum. *Beall vs. Black*, 203.
3. In cases of contract the sum recovered, and not the matter put in demand, is made to decide the question of jurisdiction. The language is where the debt or damages do not exceed one hundred dollars. *Ib.*
4. Under the act of 1805, ch. 110, the presentation of a petition by a party in confinement was alone necessary to give jurisdiction, and since the proof of confinement has been dispensed with by the act of 1830, ch. 130, the jurisdiction of the county court attaches by the presentation of a petition such as is prescribed by the acts in relation to insolvent debtors. *Bowie vs. Jones*, 208.
5. A single judge is empowered to act upon the petition of an insolvent debtor in the recess of the county court, and hence the application for relief made in conformity to the statutes, is depending in point of law, from the time of its presentation to the judge, though not filed with the clerk of the court. *Ib.*
6. Either the county court, or a judge thereof in the recess of the court, may grant a personal discharge, appoint a trustee, and take a bond. *Ib.*
7. To divest courts of general jurisdiction of their jurisdiction, terms to that end must be employed in the statutes intended to accomplish such a purpose, and it cannot be effected, unless by express terms, or by necessary implication. *Tomlinson vs. Devore*, 345.

*See* JURISDICTION, 5.

COUNTY PAPER. *See* EVIDENCE, 32, 33.

COURT OF APPEALS. *See* PRACTICE IN COURT OF APPEALS.

## COURT OF CHANCERY.

1. The executors in this case held the wife's legacy as trustees; and wherever it is necessary for a husband to resort to a court of equity to get possession of his wife's legacy, that court will require him to do equity by making a settlement upon upon his wife and children, before it will lend him its aid in the recovery of it; and a promise by the husband to the executors to do that which equity would do in this case, is founded upon a sufficient consideration. *State use of Stevenson vs. Reigart*, 1.
2. Where the husband receives the money of his wife, not in virtue of his marital rights so as to amount to a reduction into possession, but as her trustee and for her benefit, on the death of the husband it continues to be her property, for which she has a claim against his estate, and does not go to his personal representatives. *Ib.*
3. The agreement being valid and obligatory upon the husband, is to be considered as a substitution for the equity of the wife, which operated for the benefit of the wife and children, though not named, which a court of equity would specifically execute against the husband upon a bill filed for that purpose. *Ib.*



COURT OF CHANCERY—*Continued.*

4. It has been settled by this court, that the wife's equity will prevail against an assignment of the husband for valuable consideration, or in payment of a just debt. *Ib.*
5. One who is executor, and as legatee claims a right to purchase money received by him, is a proper party to a controversy to settle the right to the fund, that full and complete justice may be administered to all the persons interested in its distribution. *Berry vs. Pierson, 234.*
6. Where a defendant consents to the ratification of an audit which charges him with a sum of money, this is sufficient evidence of its receipt by him. *Ib.*
7. Where a bill gives a defendant no intimation that any claim would be made against him, but the demand appears in the proof, he may by way of exception to the auditor's report, rely upon the act of limitations, and it is no objection that it was not taken in the answer. *Ib.*
8. The defence of limitations may be taken in equity as soon as by the proceedings, the party has notice that any claim was to be made against him. *Ib.*
9. A party who receives money as a *quasi* trustee, as for the use of those to whom it belonged, not as acting under a continuing or express trust; whose duty it is to pay over immediately on its receipt, is liable to an action at law, and the act of limitations begins to run from the time of the receipt. *Ib.*
10. Where limitations are relied on in equity, and the court therefore deem it fruitless to proceed with the cause, though the claim could in other respects be maintained by an amendment of the pleadings, it will not be remanded. *Ib.*
11. Where the court perceives from the mutual allegations of the parties, and from the evidence adduced in the cause, that they had stated and settled an account between themselves, they cannot claim a decree to account. *Stiles et al, vs. Brown et al, 350.*
12. A complainant seeking to investigate ancient accounts, will have his case subjected to severe scrutiny, although he is not to be visited with all the consequences of *laches*; while on the other hand, the defendant's evidence may receive a more indulgent consideration. The time at which the claim is advanced, and a failure to prosecute it against original parties, while they were alive, are circumstances calculated to create suspicion against such a claim, and in a doubtful case strengthen the defences which the representatives of such original parties may set up. *Ib.*
13. Where the parties settle and adjust their mutual claims, and one gives the other a note for the balance due, this forecloses an enquiry into all antecedent transactions, unless upon the ground of error or fraud. *Ib.*
14. After a decree to account, on a bill filed by a residuary legatee against an executor, upon a creditor filing a claim, it is competent for the residuary legatee to plead the act of limitations. *Bowling and wife vs. Lamar, adm'r, 358.*

COURT OF CHANCERY—*Continued.*

15. This court will not pronounce upon the rights of a residuary legatee for life, with a bequest over to others, where the record does not contain the will under which the legatee claims. *Ib.*
16. Parties who take possession of the personal property of infants, and retain and use the same, will be considered in equity as those who enter upon and use their real estate, treated as guardians, and liable to account accordingly. *Chaney vs. Smallwood*, 367.
17. Where a father died, having in his possession slaves belonging to his children, his widow, as his administratrix, took possession of them, held and claimed them as her own; while the children were minors, she married again, and the retention and use of the property was continued by the second husband and wife, until her death, and by him until the time of the decree. **HELD:** that in equity he is only responsible for the conversions and hires accruing after the time of his marriage with the administratrix. *Ib.*
18. It is a general rule that, if the answer to a bill denies the existence of *any* parol contract for the sale of lands, and insists upon the benefit of the statute of frauds, the case cannot be made out by parol proof, and the bar of the statute is complete: but there is an exception to this rule, resulting from a part performance of the contract, established by many decided cases. *Hall and wife vs. Hall et al*, 383.
19. The evidence of part performance of a parol contract for the sale of lands, in the delivery of possession, or payment of purchase money, need not to be in writing, where such evidence is admissible as acts of part performance, to take a case out of the statute of frauds. *Ib.*
20. The statute of frauds was designed to exclude oral evidence of the agreement of sale; not oral evidence of the acts of part performance, or things done in execution of the agreement. *Ib.*
21. Where a complainant relies upon acts of part performance, to take a parol agreement for the sale of lands (denied by the answers,) out of the operation of the statute of frauds, it is his duty to offer full and satisfactory evidence of the terms of such agreement, and of the performance of it on his part, to entitle him to a decree for specific execution. *Ib.*
22. The principle, that where one stands by and sees another laying out money upon property, to which he has himself some claim or title, and does not give notice of it, he cannot afterwards in equity and good conscience, set up such claim or title, does not apply to an act of encroachment on land, the title to which is equally well known, or equally open to the notice of both parties; but the principle applies only against one, who claims under some trust, lien or other right, *not* equally open and apparent to the parties, and in favor of one who would be misled or deceived by such want of notice. *Casey's lessee vs. Inloes et al*, 430.
23. The true principle of estoppel, as applicable to deeds, is to prevent circuity of action, and to compel parties to fulfil their contracts; thus, a party in a deed asserting a particular fact, and thereby inducing ano-

COURT OF CHANCERY—*Continued.*

ther to contract with him, cannot, by a denial of that fact, compel the other party to seek redress, against his bad faith, by suit; but the court will decide upon the rights of the parties, without subjecting them to the expense and delay of a new litigation; and this they will do, not on the ground of concluding the parties from showing the truth, but because the whole truth being shewn, the justice of the case is not changed. *Ib.*

See LUNATICS, 1, 2.

PLEAS AND PLEADING IN EQUITY.

PRACTICE IN CHANCERY.

## COVENANT.

1. E, by articles under seal, agreed with W, that for the consideration thereinafter mentioned, he would furnish him with negroes, &c., "all which property is to remain with the said W, on the land where he now resides, for and during the term of ten years, and to pay him annually the sum of, &c. W agreed that he would pay E one-half of the crops made during the above time, and would superintend and look after all E's business." On the execution of the agreement, the negroes were delivered to W, and remained with him several years, when they ran away and came into the possession of E and R, the other defendant in the writ. **HELD:** that *replevin* was an appropriate remedy for W; and he was not bound in order to maintain it, either to show a performance, or a readiness to perform the agreement on his part, and that the contract gave him a present and immediate right to the negroes, and to possession for ten years from its execution. *Brooke vs. Berry*, 153.

DAMAGES. See ASSUMPSIT, 6.

PLEAS AND PLEADING, 17, 18, 19, 20, 21.

## DEBTOR AND CREDITOR.

1. Where the husband receives his wife's legacy from the executors of a testator making her a bequest, and promises to invest the money for her, does not invest according to the terms and conditions under which he received the legacy, and dies, his widow has a right to elect to consider him her debtor to the amount of it, as so much money had and received to her use. *State use of Stevenson vs. Reigart*, 1.
2. At common law a debtor has a right to prefer one creditor to another, and, independent of our statute in relation to insolvent debtors, may give such preference. *Cole vs. Albers and Runge*, 412.

## DEEDS.

1. The receipt in a deed for the conveyance of land is only *prima facie* evidence of the payment of the purchase money. *Wolfe vs. Hauver*, 84.
2. It is a familiar principle that receipts acknowledging the payment of money may be explained or contradicted. This constitutes an exception to the general rule giving a conclusive effect to written evidence; an exception introduced for general security and convenience, and to protect mankind from fraud. *Ib.*



DEEDS—*Continued.*

3. The cases of *Wesley vs. Thomas*, 6 *Harr. & John*. 24; *Watkins vs. Stockett*, 6 *H. & J.* 435; *Betts vs. The Union Bank*, 1 *H. & G.* 175; *Hurn vs. Soper*, 6 *H. & J.* 277, were instances in which efforts were made to change the character of deeds, or to vary the consideration stated in them, and thereby either to alter their nature and character, or maintain a deed impeached for fraud, by setting up a different consideration from that stated on its face. *Ib.*
4. A receipt for the purchase money is no necessary part of a deed, as it would, in every respect, be as valid without it, as with it. *Ib.*
5. In construing a deed made to a canal company for the purposes of its works, the court will presume that the parties to it understood their relative rights, powers, and duties, in respect to the subject matter of their contract. *Leopard vs. Ch. & O. Canal Co.* 222.
6. Evidence cannot be admitted which would have the effect of changing the character and legal operation of a deed. *Cole vs. Albers and Runge*, 412.
7. When a deed purports to have been made on a monied consideration, it cannot be shown that money did not constitute the consideration; where a deed is impeached for fraud, and the consideration stated is money, it will not be allowed to set up a different consideration as marriage to support the deed. *Ib.*
8. The true principle of estoppel, as applicable to deeds, is to prevent circuitry of action, and to compel parties to fulfil their contracts; thus, a party in a deed asserting a particular fact, and thereby inducing another to contract with him, cannot, by a denial of that fact, compel the other party to seek redress, against his bad faith, by suit; but the court will decide upon the rights of the parties, without subjecting them to the expense and delay of a new litigation; and this they will do, not on the ground of concluding the parties from showing the truth, but because the whole truth being shewn, the justice of the case is not changed. *Casey's lessee vs. Inloes et al.* 430.
9. The grounds on which the presumption of a deed rests at law, are, that the rightful owner has so long submitted to acts of ownership over his property, exercised by another, without ever having sued for the recovery of his property, or damages for the unlawful invasion of his rights, that he is presumed to have granted them to him, by whom the acts of ownership are exerted. *Ib.*
10. *M* was patented in 1663. In 1734, *J*, including a part of *M*, was also patented, and in 1737 an escheat warrant and patent issued for *M*. The two last patents were granted to *F*, under whose devisee, the plaintiff claimed *M* by his deed of 1758. HELD: that the conveyance passed *M*, as it was held under the original patent of 1663, be the effect of the patent of *J* what it may. *Ib.*

See EVIDENCE, as to effect of recitals in deeds, 65, 68.

## MORTGAGE.

PRESUMPTION OF LAW, 3, 4, 5, 6.

RIFARIAN PROPRIETOR.

DEFENCE ON WARRANT. *See* EJECTMENT, 18.

### DEMURRER.

1. A demurrer is a direct attack on the pleadings themselves, whereon the court must of necessity inspect all the pleadings in the case, as well to enable it to ascertain the sufficiency of the particular pleading demurred to, as in giving its judgment thereon to mount up to the first material error in pleading. *Leopard vs. C. & O. Canal Co.* 222.

### DISCONTINUANCE OF POSSESSION.

*See* LIMITATION OF ACTIONS, 14.

DISTRESS. *See* LANDLORD AND TENANT, 2, 3, 4.

DISTRIBUTION. *See* EXECUTOR AND ADMINISTRATOR, 6.

### DOWER.

1. The election of a widow to stand upon her legal rights, though it occasion loss to devisees under her husband's will, is still a loss resulting by operation of law, and against which the testator only could have provided an indemnity. *Darrington vs. Rogers*, 403.
2. By the election of a widow to renounce her husband's will, all devises and bequests made to her are inoperative and void; and the property given to her, except so far as it may be diminished by the exertion of her legal rights, remains as if no such devises to her had been made. *Ib.*
3. Apart from the act of 1810, concerning lapsed legacies and devises, it stands precisely in the condition in which it would have stood had the wife died in the life-time of the testator. *Ib.*

### EJECTMENT.

1. Extracts from the rent-rolls may tend to disprove possession under an escheat patent, in a particular person, at a given period, by *not* showing that such person, at such period, was in possession, nor that quit-rents were charged to him on account of such escheated lands, as also by showing that others were charged therefor. *Casey's lessee vs. Inloes et al*, 430.
2. Where a tract of land was patented in 1663, and no conveyance from the patentee, but a deed for the same land in 1685 was in proof, from *W* to *J*, and another deed for the same tract in 1689, from *B* to *T*, with proof of title, from *T* to the lessor of the plaintiff, who brought her action of ejectment in 1841, but no evidence that *W*, *J*, or *B* had ever been in possession, or how *W* or *B* acquired or claimed title, the court cannot be called upon to instruct the jury that they are bound to presume a deed from the *patentee* or those claiming under him, to *W*, or from *J* to *B*, or his ancestor, for such tract of land; though it would have been competent to have required an instruction to the jury that they must presume a deed from the patentee, or those claiming under him, to *B*, from whom the paper or record title was perfect. *Ib.*
3. A continuous possession of twenty years or upwards, in a party, or those claiming under him, will authorise him or them to supply the absence of a conveyance to such party from one seized before him, by requiring the court to instruct the jury to presume such a conveyance. *Ib.*

EJECTMENT—*Continued.*

4. No direct proof of possession in a given party can be reasonably expected after a lapse of one hundred and fifty years. *Ib.*
5. The certificate of the surveyor of the county, made in 1698, that a tract of land began at a bounded white oak, standing in the *line of a parcel of land* formerly belonging to *M*, "*and now in the possession of the aforesaid T*," returned to the land office about nine years after a deed to *T*, is evidence of *T*'s possession of the land referred to as formerly belonging to *M*. *Ib.*
6. So proceedings in ejectment, commenced in 1704, by *C* against *H*, the grantee of *T*, in which the premises sued for were described as *late in the tenure and occupation of T*, and the lessor of the plaintiff, recovered judgment upon title derived from *H*, are evidence that *T* had been in possession, is confirmatory of the surveyor's certificate, and that *H* was in possession at the institution of the suit. *Ib.*
7. A recital in a deed, dated in 1756, professing to be made by the son and heir-at-law of one joint tenant, conveying land to the surviving joint tenant, and declaring that he "now continues as survivor, seized, and yet is actually seized of such lands," is evidence in 1843, that such survivor was possessed at the date of the deed. *Ib.*
8. Where a plaintiff in ejectment deduces a regular paper title from two grantors, the possession of either, the other necessary circumstances concurring, will enable him to ask the presumption of a conveyance to the party in possession. *Ib.*
9. It is not universally true that possession of land is a matter of fact which must be proved by the same kind of testimony requisite for the proof of any other fact or occurrence. *Ib.*
10. Possessions of modern date, susceptible of proof by living witnesses, may be within the general rule; but as to those of such antiquity, that the brevity of human life demonstrates that such proof cannot be had, these are not within the rule. *Ib.*
11. Certificates of public surveyors, entries in debt books, recitals in deeds of ancient date, are evidence to prove ancient possession of lands. *Ib.*
12. A plaintiff in ejectment, who claims title under two grantors, is not estopped from setting up the paramount title of the one, or alleging that he derived no title from the other. *Ib.*
13. The general principle is well established, that possession of a part of a tract or parcel of land, by him who is legally entitled to the entirety, carries with it possession to the extent of his legal rights; and no wrong-doer can, in contemplation of law, by entry, or the exercise of acts of ownership thereon, acquire the possession of any part thereof, but by actual enclosure, or ouster, actual or presumptive. *Ib.*
14. By the act of 1745, ch. 9, sec. 10, "all improvements, of what kind soever, either wharfs, houses, or other buildings, that have or shall be made out of the water, or where it usually flows, (as an encouragement for such improvers,) be forever deemed the right, title and inheritance of such improvers, their heirs and assigns forever." In the year 1698 a patent issued for a parcel of land called *M's Neck*, lying in *Chesapeake Bay*, and on the *N.* side of a river called *Patapsco*, and on the



EJECTMENT—*Continued.*

*N.* side of the *N. W.* branch of said river : Beginning at a marked red oak by a little branch, and running up along the *N. W.* branch, for breadth, *W. N. W.* 100 p. over a cove unto a marked white oak, &c.  
**HELD :**

- 1st. That the patentee of this land, and those claiming under him, had by virtue of the act of 1745, a mere privilege of acquiring property by its reclamation from the water ; that until reclaimed, she had no property ; no possession ; no right, under that act.
- 2nd. That a party, by erecting a fence for thirty years and upwards, on a part of the low grounds adjacent to such tract designated as the cove, in front of that part of *M's Neck* claimed by the plaintiff, which was covered by the flow of the tide, and claiming below it, did not furnish evidence of such an uninterrupted, continuous possession, as was essential to the presumption of a grant to the person making and extending such fence.
- 3rd. That being erected on navigable water, without the limits of the land owned by the patentee, it gave him no right of action.
- 4th. That ejectment would not lie, there being no title in the land.
- 5th. That trespass, in which the law implies an injury, whether sustained or not, could not be maintained for want of ownership in the soil.
- 6th. A party in possession of land adjacent to a navigable stream, who runs a fence from his land into the stream, across the front of another adjacent proprietor, gains no possession by such an act, which is in itself a trespass. *Ib.*
15. The principle, that where one stands by and sees another laying out money upon property, to which he has himself some claim or title, does not give notice of it, he cannot afterwards in equity and good conscience, set up such claim or title, does not apply to an act of encroachment on land, the title to which is equally well known, or equally open to the notice of both parties ; but the principle applies only against one, who claims under some trust, lien or other right, *not* equally open and apparent to the parties, and in favor of one who would be misled or deceived by such want of notice. *Ib.*
16. Where defence is taken on warrant of resurvey, all possessions, whether relied on to prove title, for illustration, or to disqualify witnesses examined on the survey, must be located on the plots of the cause. *Ib.*
17. Where several defendants, in an action of ejectment, claim title to several and distinct parcels of the land sued for, as by separate and independent leases, and there is no evidence to show any possession in any person under whom two or more of the defendants claim to derive title, a presumption of a grant, founded on the possession of the claimant of one lot, cannot enure to the benefit of the claimant of a separate and distinct lot, of which no such possession had ever been held. *Ib.*
18. In a case where a jury may be authorised to presume a grant to defendants in possession, such presumption may be made, either of a grant from the plaintiff, or from any person under whom the plaintiff derived title, according to the proof *Ib.*

EJECTMENT—*Continued.*

19. Upon every discontinuance of the possession of a wrong-doer, by operation of law the possession of the rightful owner is restored, and nothing short of an actual, adverse and continuous possession for twenty years can destroy his right, or vest a title in the wrong-doer. *Ib.*
20. When a court as an inference of law, arising from proof of possession, directs a jury to presume a deed, it is done upon principles of public policy, for the protection of ancient possessions. *Ib.*
21. All that the law requires to raise the presumption is, that the possession should have been actual, adverse, exclusive, and continuous, and under claim of title. *Ib.*
22. A party cannot call upon the court to instruct the jury where defence is taken on warrant, as to the effect of a patent not located upon the plats, nor given in evidence to the jury. *Ib.*
23. The court cannot be called upon to say that an original patent must be construed by reference to its relation to another patent, founded on a resurvey of the same land, where the second patent did not appear in evidence, and where the same parties claimed under both patents. *Ib.*
24. The State acquires by escheat, not only that which was originally granted, but all the rights, privileges, priorities and appurtenances incident to the land itself, and with which it was held by the person who died seized without heirs. *Ib.*
25. The escheat grantee, upon the terms specified in his grant, takes the estate granted in the same condition in which it may have devolved on the State, except so far as it may be affected by the doctrine of merger or extinguishment. *Ib.*
26. An escheat grant relates to the original grant, and passes to the escheat grantee all that passed to the original grantee, and which was held by him, whose death, without heirs, occasioned the escheat. *Ib.*
27. The relation of the escheat grant to the original grant is not intercepted by an intermediate patent, unless, at the time of granting the same, the escheat right had accrued. *Ib.*
28. Until the occurrence of the event which constitutes the escheat, the interest of the Lord Proprietary in relation to it, was a mere possibility, and could not be the subject of a grant. *Ib.*
29. The doctrine of estoppel does not apply to grants made by the State. They only pass the title which the State had at the time of the grant, and not that subsequently acquired. *Ib.*
30. An escheat grant is *prima facie* evidence that the land granted is liable to escheat, at the date of issuing the escheat warrant, and not antecedently. *Ib.*
31. *M* was patented in 1663. In 1734, *J*, including a part of *M*, was also patented, and in 1737, an escheat warrant and patent issued for *M*. The two last patents were granted to *F*, under whose devisee, the plaintiff claimed *M* by his deed of 1758. **HELD:** that the conveyance passed *M*, as it was held under the original patent of 1663, be the effect of the patent of *J* what it may. *Ib.*
32. As far as regards any conflict of rights between the parties to this cause, the defendants, under the act of 1745, had a right to extend

**EJECTMENT—Continued.**

westwardly in front of their lots to the west side of *Caroline* street and no further; and the lessor of the plaintiff had a right to extend her grounds to the City Dock, on the south side of *Lancaster* st. *Ib.*

33. A grant, though for the most part covered with water, still passes to the grantee all the soil under the water, included within its outlines, with all the rights of property incident thereto, subject only to the rights of the public as to fishing and navigation. If encroached on, the grantee may maintain trespass or ejectment. *Ib.*
34. The act of 1745, ch. 9, never was designed to give one land-holder the power of extending his improvements over the land of another. *Ib.*
35. The right of the riparian proprietor to extend his improvements into the water, is intercepted by a grant from the State to another person of the land covered by the water of a navigable stream, over which such proprietor might otherwise have been entitled, under the act of 1745, to make improvements. *Ib.*
36. The heir of lessee for a term of years of a lot bordering on the water, under the act of 1745, ch. 9, sec. 10, is not the riparian proprietor of such lot. *Ib.*
37. Where possession was essential to the acquisition of title to land, and title to the creation of a riparian right, any prayer founded on that right, which did not submit the fact of possession to the jury, should be rejected. *Ib.*

*See* RIPARIAN PROPRIETOR.

**ERROR.** *See* PRACTICE IN COURT OF APPEALS.

**ESCHEAT.** *See* LAND OFFICE, 2, 3, 4, 7, 13 to 22.

EVIDENCE, 42, 61, 62.

**ESTOPPEL.**

1. The true principle of estoppel, as applicable to deeds, is to prevent circuity of action, and to compel parties to fulfil their contracts; thus, a party in a deed asserting a particular fact, and thereby inducing another to contract with him, cannot, by a denial of that fact, compel the other party to seek redress, against his bad faith, by suit; but the court will decide upon the rights of the parties, without subjecting them to the expense and delay of a new litigation; and this they will do, not on the ground of concluding the parties from showing the truth, but because the whole truth being shewn, the justice of the case is not changed. *Casey's lessee vs. Inloes et al*, 430.
2. The doctrine of estoppel does not apply to grants made by the State. They only pass the title which the State had at the time of the grant, and not that subsequently acquired. *Ib.*

**EVIDENCE.**

1. A promise by the vendor of a horse to furnish a breeder's certificate that the animal was thorough bred, does not authorise the defendant in an action against him for the purchase money, to introduce the opinion of a witness who had seen its pedigree as forwarded by the plaintiff to the defendant, that he did not consider it thorough bred,



EVIDENCE—*Continued.*

- as evidence to the jury, without producing the paper which contained it. *Mulliken vs. Boyce*, 60.
2. A witness is not competent to speak of the contents of a paper writing or document without producing it. *Ib.*
  3. Where a defendant lived with the witness, and kept papers at his house, and had also a plantation and house to which he frequently went, and where the witness had seen papers which he supposes belonged to defendant, an unsuccessful search for a paper alleged to be left at the house of the witness, and no search any where else, is not sufficient to let in secondary evidence of the contents of the paper as a lost paper. *Ib.*
  4. The security of an administrator may, under circumstances, become a competent witness for his principal to maintain an action of law to recover money due the intestate's estate; although at one period the administrator may have been guilty of a *devastavit* in relation to the same claim. *Mitchell vs. Mitchell*, 66.
  5. As where from the lapse of time, after due notice having been given under the testamentary act to creditors to assert their claims, they are presumed to have been satisfied and none appeared to exist, and where the sole distributee of the deceased had released both the administrator and sureties from all claims, this obviates all objection on the ground of liability on the surety for the omission of the administrator. *Ib.*
  6. A release to an administrator and his sureties may be legally recorded in the orphans court of the county where letters of administration were granted, and a copy certified by the Register of Wills of the same county, is competent evidence. *Ib.*
  7. An administrator in his settlement with a distributee may assign the choses in action of his intestate by parol. *Ib.*
  8. The Register of Wills is authorised and bound to record administration accounts proved and passed, and a copy under his official seal is competent evidence. *Ib.*
  9. Where letters of administration were granted in 1830, and an order of court notifying creditors to bring in their claims obtained and published in 1831, and an account proved and passed in 1832, by which it appeared that a number of creditors had been paid, *it was held* in 1842, no unsatisfied creditors appearing in proof, that all the creditors of the estate were paid and discharged. *Ib.*
  10. The act of 1828, ch. 165, which authorises the taking of testimony in civil cases, before commissioners to be appointed by the countycourts, manifestly contemplates a case where both the plaintiff and defendant are in existence and actually parties to the litigation upon the record at the time the notice is given by the commissioners, and the deposition taken in pursuance thereof. *Ib.*
  11. So where a defendant is dead, and no new party having been made, a deposition taken, is without authority under that act. *Ib.*
  12. Where commissioners are appointed under an Act of Assembly by the

EVIDENCE—*Continued.*

- courts to take proof between parties, no rule of court can transfer powers to the commissioners, designed by the act to be exercised by the courts or the judges thereof. *Ib.*
13. The receipt in a deed for the conveyance of land is only *prima facie* evidence of the payment of the purchase money. *Wolfe vs. Hauver*, 84.
  14. It is a familiar principle that receipts acknowledging the payment of money may be explained or contradicted. This constitutes an exception to the general rule giving a conclusive effect to written evidence; an exception introduced for general security and convenience, and to protect mankind from fraud. *Ib.*
  15. Though a party cannot discredit his own testimony, yet he may show that his witness is mistaken; and is not precluded from showing the truth by any testimony, oral or written, which he may produce. *Ib.*
  16. Where a witness proved the admission of a debt by the defendant in a conversation with him, he cannot, in reply to the question, why he called on the defendant, be permitted to testify to information which he had received from other persons strangers to the action; though it constituted the inducement to call on the defendant, it was hearsay. *Ib.*
  17. It is the duty of parties where they design to introduce hearsay evidence for the purpose of impeaching a witness, to apprise the court of such design. *Ib.*
  18. It is incompetent to introduce illegal testimony, and then impeach the witness, by disproving the facts thus illegally established. *Ib.*
  19. A witness cannot be permitted to state the contents or effect and operation of a written instrument without producing it. *Calvert vs. Coxe*, 95.
  20. Facts proved on a former trial by a deceased witness, are admissible on a second trial of the same case. They could only be rejected on the presumption, that facts were proven on the first trial, which were inadmissible as evidence, which is not to be intended. The reasonable presumption is, that such facts were alone proved as were admissible. The court should act on this presumption upon the offer of proof of the deceased witness' testimony, until the contrary appeared. *Ib.*
  21. In an action by an attorney for compensation for professional services upon a *quantum meruit*, it is not competent for the plaintiff to offer evidence as to what sum was paid to, or demanded by, any attorney in particular, for like services. The usual and customary compensation for services of the like kind, is admissible evidence; but what was paid to any particular individual, standing *per se*, is inadmissible. *Per Prince George's county court—affirmed by a division of this court.* *Ib.*
  22. It is a sound rule that before a party can discredit a witness by proof of his having made statements at variance with his testimony, the witness whom it is intended to impeach, should *first* be afforded a

EVIDENCE—*Continued.*

full and fair opportunity to recollect, by calling his attention to dates, names, or other attendant circumstances, as connected with the matter about which he is to be charged with having made different statements; but in the matter of the testimony which it is proposed to contradict, or in the manner of arriving at it, a party will not be allowed to violate any positive rule of evidence. *Whiteford vs. Burckmyer & Adams*, 127.

23. It is not permitted to ask a witness any fact which fancy or idle curiosity may suggest for the purpose of disproving it by another witness; nor is it proper to ask a witness, with the same view, of a fact proper in itself to be proved in the cause, if the only knowledge of such fact has been obtained through a source which the rules of evidence do not recognize as competent. *Ib.*
24. It is a rule of evidence, subject to very few and well defined exceptions, that a party cannot offer in evidence his own declarations in relation to the subject in controversy. *Ib.*
25. Where a question proposed to be asked of a witness involves several distinct members, the court is not bound to select from it such members as might be admissible, if unaccompanied by the others with which it is connected, and say that such particular portions of the testimony are proper. *Ib.*
26. A letter written by the plaintiffs in the cause to a third party, unaccompanied with other proof, is like their verbal declaration to him; and where it was intended to establish that the letter contained a certain enclosure, the party to whom it was addressed, and who received it, being a competent witness, is the best evidence to establish the fact. *Ib.*
27. In an action by an endorsee against the endorser of a bill of exchange, the drawer is a competent witness to prove that he had received notice of non-acceptance, and his declarations to a third person are not therefore the best evidence of that fact. *Ib.*
28. Where an agency is established, it is generally true, that an admission of an agent while in the execution of his agency, is admissible to charge his principal. *Ib.*
29. The necessity for plain and satisfactory proof as to the *time of service* of notice of non-acceptance, where that is material, has always been insisted on; it may be proved by circumstantial testimony, but the circumstances must point *not to notice at some time*, but to notice on the day when the party had a right to expect and receive it. *Ib.*
30. The rule which excludes hearsay evidence is as obligatory in repelling and discrediting testimony, as in confirmatory. *Ib.*
31. The declarations of a person who is a competent witness cannot be offered in evidence merely because they are in reply to the testimony of other witnesses. *Ib.*
32. In an action of *replevin* brought for certain slaves by W against R and E, it was proved, that for several years before the 1st January



EVIDENCE—*Continued.*

1837, the defendant E was in possession of the slaves taken under the writ. The plaintiff for the purpose of showing title in himself, proposed to read to the jury articles of agreement dated on that day, between himself and E, by which the latter agreed to furnish him with certain negroes (bearing the same names with those replevied,) for the period of ten years. The defendant objected to the admissibility of the articles of agreement, upon the ground that there was no evidence that he claimed title under E, or any connexion between them. **Held:**

1. That if the articles of agreement furnished evidence that E's title had passed to W, (the plaintiff having first showed that E had title,) they established his title against the defendant, whether the defendant claimed under E or not, or whether E had any connexion with R or not.
2. That the question to be decided was the admissibility of the evidence offered, and not the correctness or incorrectness of the particular ground on which the court below decided.
3. That there must be some evidence to show the identity of the negroes assigned, with those replevied.
4. That having shown title in E, the articles constituted a link of the plaintiff's title, and would or would not be evidence in the cause, upon the establishment or failure to establish the identity of the negroes.
5. That the defendant having objected to the evidence on a ground that assumed the identity of the negroes, and before the plaintiff had an opportunity of disclosing his whole proof, the court below were justified in assuming, what he, in such a state of the case, conceded.
6. The original possession of E, the negroes being replevied from him, and bearing the same names in the articles and writ, and nothing to show that E had other negroes of same name, is evidence of identity. *Brooke vs. Berry*, 153.
33. The single bill of a collector of the county, sealed as collector, promising to pay the equitable plaintiff in the action, a sum of money "for value received, with interest, the same being for county paper due for the year 1836-7." **Held:** to be sufficient evidence in the absence of contradictory proof, to entitle the plaintiff to a verdict upon the bond of the collector, as well against the principal as his securities. *Baden et al vs. State use of Clark*, 165.
34. Such a bill, is an implied admission, that the obligor had collected and received the amount therein mentioned; that the same had been levied, and the levies transferred to the obligee. *Ib.*
35. Where a record of proceedings in Chancery does not appear in the bill of exceptions, this court cannot decide whether the county court erred in rejecting it as evidence or not. *Duvall vs. Peach*, 172.
36. A party in a cause cannot prove by a solicitor in Chancery, that in the opinion of such solicitor, judging by an examination of certain pro-

EVIDENCE—*Continued.*

- ceedings in that court to vacate conveyances, (without producing the record,) that he had used reasonable diligence to accomplish the object of such proceedings. *Ib.*
37. Parol proof of facts of which the plaintiff had record evidence cannot be given; it is not the best evidence in legal contemplation. *Ib.*
38. An instrument of writing in the following words, viz: "we hereby bind ourselves to pay W all that we receive over \$400 of the C. and O. C. company in our cases against said L and M," signed by the defendant, does not *per se* contain evidence of a consideration. *Keefer vs. Mattingly*, 182.
39. But the connexion of this paper with other proof leading to the inference, that the plaintiff in the action had forborne to defend certain actions depending at the time of its execution, and in consequence of, and reliance upon it, allowed judgments to be rendered, is sufficient evidence of a consideration for its execution, proper to be left to the jury. *Ib.*
40. L assigned to M his claim against the C. and O. C. company. At this time K had an attachment pending against the funds of L, in the hands of the company, and shortly afterwards agreed to pay M all sums he should receive over and above the sum of, &c. In an action by M against K to recover such surplus, the assignment from L to M is admissible evidence, as a basis for the introduction of the agreement between M and K, and calculated to explain the reasons for that agreement. *Ib.*
41. Extracts from record books deposited in the land office, showing the name and rank of grantee, and number of the lot and acres, with a particular description of such lot as surveyed, to which an officer or soldier of the Revolution was entitled, which books purport to have been made under the authority of the act of 1788, ch. 44, with a certificate from the register of the land office, under his seal of office, that the same have been carefully collated and compared with the original record books from which they were respectively taken and agreed therewith, are sufficient evidence to show title in the person named in such extracts, to the lot therein described. *Lee vs. Hoye*, 188.
42. An escheat grant is *prima facie* evidence of title, and is available for that purpose until the contrary is proved. *Ib.*
43. A release under the insolvent laws pleaded and relied upon as a defence in bar of the action, and upon an issue joined on a denial of the truth of the plea, when offered in evidence, is said to come incidentally in question. *Bowie vs. Jones*, 208.
44. The release of an insolvent debtor is an exception to the principle, that where the course of procedure is pointed out by statute, the proceedings must show their conformity with the act by which they are authorised. *Ib.*
45. Where the release of an insolvent debtor comes incidentally in question, it cannot be avoided upon the ground, that the insolvent had a

EVIDENCE—*Continued.*

- prior application depending at the time of the one under which he obtained his final discharge. *Ib.*
46. Where the jurisdiction of a court once attaches, and the court proceeds to final judgment, the same judgment, coming incidentally in question, is to be respected. *Ib.*
  47. Where a defendant consents to the ratification of an audit which charges him with a sum of money, this is sufficient evidence of its receipt by him. *Berry vs. Pierson*, 234.
  48. Z. sold to W. a tract of land, gave him a bond of conveyance, and received his promissory note signed by him, *first* in his own name, and *secondly* as agent for the S. M. Company. The latter was a manufacturing institution, and required land for its operations. The note not being paid, Z. brought his action against both; the Company only appeared; the declaration counted upon the note. The proof showed that the agent was the general agent of the Company; had bought other land for the use of the Company which it retained and paid for, and that the agent was in the habit of signing its notes as agent, which were paid by the Company. **HELD:** that the bond of conveyance was the only legal evidence of the nature and character of the contract, and that the purchase was made by W. on his own account; and as the Company was not authorised to become surety by its charter, the note was a nullity. *Worthington vs. The Savage Man. Co.* 284.
  49. Where a note is executed by an agent before it is admissible in evidence, it is necessary to prove, not only his signature, but the authority by which it is made. *Ib.*
  50. A bond of conveyance which recites that the obligor did sell to the obligee, and contract and agree to grant and convey to him, his heirs and assigns, a certain tract of land, acknowledging the receipt of the cash part of the purchase money from him, with the notes of the obligee and another, for the balance thereof, and stipulating until default should be made in the payment of the purchase money, that he should hold the land sold as aforesaid, demonstrates that the obligee made the purchase on his own account, and parol evidence is not admissible to contradict it in that respect. *Ib.*
  51. Parol evidence is inadmissible to prove that a grant made to one person was intended to be made to another. *Ib.*
  52. The fact that the orphans court has endorsed the claim of an administrator against his intestate's estate, to be allowed when paid, will not prevent the residuary legatee from objecting, before the same court, to the justice of the demand, and requiring full proof of its existence prior to the ratification of the administration accounts, in which he seeks an allowance of his demand as paid. *Bowling and wife vs. Lamar*, 358.
  53. For want of full proof when demanded, the orphans court may reject any claim against a deceased's estate, after it has been passed and before payment. *Ib.*



EVIDENCE—*Continued.*

54. Where, after the execution of a deed of mortgage, the mortgagor lent money and sold goods to the mortgagee, and took notes for the payment of his debt, in semi-monthly instalments, this is evidence that he did not know his debtor to be in an insolvent condition. *Cole vs. Albers and Runge*, 412.
55. The notice required by the act of 1834, to vitiate a conveyance is not a technical or constructive notice, but an actual notice derived from a knowledge of the condition of the grantor of such conveyance *Ib.*
56. Evidence cannot be admitted which would have the effect of changing the character and legal operation of a deed. *Ib.*
57. When a deed purports to have been made on a monied consideration, it cannot be shown that money did not constitute the consideration ; where a deed is impeached for fraud, and the consideration stated is money, it will not be allowed to set up a different consideration as marriage to support the deed. *Ib.*
58. Where the consideration stated in a mortgage is a sum of money in hand paid, and it is taken to secure that sum, evidence is admissible to show a part of the sum paid, and that it was to secure advances made, and to be made, to that extent. Such evidence would not affect the nature of the deed. It would still be founded on a money consideration. *Ib.*
59. Such evidence is also admissible to rebut the idea of fraud, by showing the same kind of consideration, differing only in amount, and the circumstances under which it assumed this shape. *Ib.*
60. A certified copy of the rent-roll, extracted from the debt books of the Lord Proprietary, under the hand and seal of the Register of the Land office, having relation to the possession of the tract of land claimed in an action of ejectment, is competent evidence for the defendant in all cases of controverted possession, or when possession is relied on as evidence for the presumption of a grant. *Casey's lessee vs. Inloes et al*, 430.
61. An escheat patent is conclusive evidence of the fact of an escheat grant. *Ib.*
62. Extracts from the rent-rolls may tend to disprove possession under an escheat patent, in a particular person, at a given period, by *not* showing that such person, at such period, was in possession, nor that quit-rents were charged to him on account of such escheated lands, as also by showing that others were charged therefor. *Ib.*
63. No direct proof of possession in a given party can be reasonably expected after a lapse of one hundred and fifty years. *Ib.*
64. The certificate of the surveyor of the county, made in 1698, that a tract of land began at a bounded white oak, standing in the line of a parcel of land formerly belonging to *M*, "*and now in the possession of the aforesaid T*," returned to the land office about nine years after a deed to *T*, is evidence of *T*'s possession of the land referred to as formerly belonging to *M*. *Ib.*
65. So proceedings in ejectment, commenced in 1704, by *C* against *H*, the grantee of *T*, in which the premises sued for were described as *late in*

## EVIDENCE—Continued.

*the tenure and occupation of T*, and the lessor of the plaintiff, recovered judgment upon title derived from *H*, are evidence that *T* had been in possession, is confirmatory of the surveyor's certificate, and that *H* was in possession at the institution of the suit. *Ib.*

66. A recital in a deed, dated in 1756, professing to be made by the son and heir-at-law of one joint tenant, conveying land to the surviving joint tenant, and declaring that he "now continues as survivor, seized, and yet is actually seized of such lands," is evidence in 1843, that such survivor was possessed at the date of the deed. *Ib.*
67. It is not universally true that possession of land is a matter of fact which must be proved by the same kind of testimony requisite for the proof of any other fact or occurrence. *Ib.*
68. Possessions of modern date, susceptible of proof by living witnesses, may be within the general rule; but as to those of such antiquity, the brevity of human life demonstrates that such proof cannot be had, these are not within the rule. *Ib.*
69. Certificates of public surveyors, entries in debt books, recitals in deeds of ancient date, are evidence to prove ancient possession of lands. *Ib.*
70. Facts of great antiquity, resting wholly in parol, of which no written evidence can be presumed to exist, may be established by hearsay evidence. *Ib.*
71. Where defence is taken on warrant of resurvey, all possessions, whether relied on to prove title, for illustration, or to disqualify witnesses examined on the survey, must be located on the plots of the cause. *Ib.*
72. An escheat grant is *prima facie* evidence that the land granted is liable to escheat, at the date of issuing the escheat warrant, and not antecedently. *Ib.*

See ACCOUNT STATED, 2.

BILLS OF EXCHANGE, &c., 16, 17, 18, 21.

NOTARY PUBLIC.

PRACTICE, 6.

PRACTICE, as to issuing and executing commissions to take evidence,  
17 to 22

STATUTE OF FRAUDS, 5, 6, 7, 8.

## EXECUTION.

1. Upon a judgment, execution and sale, the title to land passes, though the defendant in the judgment was a lunatic at the time of its rendition. *Tomlinson vs. Devore*, 345.
2. Courts of justice guard and maintain with jealous vigilance the titles of purchasers acquired under judicial sales. *Ib.*

## EXECUTOR AND ADMINISTRATOR.

1. An executor may interpose to protect a wife's equity in property under his control. *State use of Stevenson vs. Reigart*, 1.
2. An executor or administrator may retain the amount of a debt due him by his deceased testator or intestate, out of his estate, or its due proportion of assets, without passing his claim before the orphans court. *Ib.*

EXECUTOR AND ADMINISTRATOR—*Continued.*

3. The act of limitations does not apply to the claim of an executor against his testator, who retained for his debt. He could institute no suit at law against himself. *Ib.*
4. Where the administrator of a deceased tenant continues the tenancy of his intestate until after the death of the landlord, the owner of the fee, the rent due up to the last day of payment prior to the landlord's decease, might have been distrained for by him, and is therefore a preferred claim upon the assets of the deceased tenant found upon the demised premises, under the act of 1836, ch. 192. *Longwell and Ege vs. Ridinger*, 57.
5. For rent due and payable at the landlord's death, his administrator may claim a preference to be paid out of the assets of his deceased tenant, where the claim conforms to the act of 1836, ch. 192. *Ib.*
6. An administrator in his settlement with a distributee may assign the choses in action of his intestate by parol. *Mitchell vs. Mitchell*, 66.
7. Where letters of administration were granted in 1830, and an order of court notifying creditors to bring in their claims obtained and published in 1831, and an account proved and passed in 1832, by which it appeared that a number of creditors had been paid, *it was held* in 1842, no unsatisfied creditors appearing in proof, that all the creditors of the estate were paid and discharged. *Ib.*
8. The right to interpose the plea of limitations to claims against a deceased's estate, *before the orphans court*, is vested in executors and administrators by our testamentary system. *Bowling and wife vs. Lamar, adm'r*, 358.
9. After a period of near fifteen years, in the absence of all proof to the contrary, the orphans court, in reviewing the proceedings of an executor, should assume the payment of all debts and legacies. This presumption rests on the duty of the executor, and his due discharge of it.—*Gardner and Hughes ex'rs vs. Simmes*, 425.
10. As to legacies bequeathed to an executor, the law will assume that he holds as legatee, after the lapse of a sufficient period allowed for the settlement of the estate. What would be regarded such a period, might depend on the peculiar circumstances of each case. *Ib.*
11. The acts of 1798, ch. 101, and 1820, ch. 161, confer jurisdiction on the orphans court to coerce the delivery over of property, or *choses in action*, or payment of money, by the representative of the executor or administrator to the administrator d. b. n. of the first deceased, only in case, the property, *choses in action* or money, belonged specifically to the deceased while alive, and remained in the hands of the executor and administrator as such, and not as legatee; or in case the *chose in action*, &c., was received by the executor or administrator in that capacity, and was so retained until his death. *Ib.*
12. In such cases the orphans court may decree the delivery up of the specific property, so retained, but cannot decree its nominal or estimated value. *Ib.*

EXTINGUISHMENT OF CONTRACT. *See* CONTRACT.



**FEES.** See ATTORNEY AT LAW.

**FIERI FACIAS.** See EXECUTION.

**FISHING—FISHERY.** See LAND OFFICE, 23.

**FRAUD.**

1. The design of the act of 1825, ch. 50, was to prevent liens on property to the prejudice of creditors, for amounts and claims never contemplated by the parties at the time of the execution of their mortgage, of which the mortgage, by its terms, gave no notice. *Cole vs. Albers and Runge*, 412.
2. A deed executed to cover a mortgage against all future liabilities of any and every description, which the mortgagor might incur or be responsible for to the mortgagee, would be within its provisions. *Ib.*

See PLEAS AND PLEADING, 17.

**FREEDOM.** See NEGROES AND SLAVES.

**FULL PROOF.** See EVIDENCE, 52, 53.

**GUARDIAN AND WARD.** See INFANCY—INFANTS.

**HIGHWAYS.**

1. The *Chesapeake and Ohio Canal Company* has no right in cutting its canal across public highways, utterly to destroy them, and it is bound to unite, for the public accommodation, the highway thereby divided, by a reasonably convenient thoroughfare over or under its canal. *Leopard vs. Ch. & O. Canal Co.* 222.
2. A deed from a party seized of land, conveying to the *C. and O. Canal Company* "such portion and quantity of his land as may be covered, used or occupied by the said canal, or the necessary works thereof," and describing the premises conveyed, is not a contract to surrender the privilege of using public highways which passed through the granted premises. *Ib.*

**HUSBAND AND WIFE.**

1. Where the husband receives the money of his wife, not in virtue of his marital rights so as to amount to a reduction into possession, but as her trustee and for her benefit, on the death of the husband it continues to be her property, for which she has a claim against his estate, and does not go to his personal representatives. *State use of Stevenson vs. Reigart*, 1.
2. The agreement being valid and obligatory upon the husband, is to be considered as a substitution for the equity of the wife, which operated for the benefit of the wife and children, though not named, which a court of equity would specifically execute against the husband upon a bill filed for that purpose. *Ib.*
3. It has been settled by this court, that the wife's equity will prevail against an assignment of the husband for valuable consideration, or in payment of a just debt. *Ib.*
4. Where the husband receives his wife's legacy from the executors of a testator making her a bequest, and promises to invest the money for her, does not invest according to the terms and conditions under

**HUSBAND AND WIFE—Continued.**

which he received the legacy, and dies, his widow has a right to elect to consider him her debtor to the amount of it, as for so much money had and received to her use. *Ib.*

See COURT OF CHANCERY, 17.

**IGNORANCE OF THE LAW.**

1. Ignorance of the law cannot be made available where there is a full knowledge of all the facts. *State use of Stevenson vs. Reigart*, 1.
2. The case of *Bowley and Lammot*, 6 H. & J. 524, was held an exception to the general rule; for there a *forfeiture of title* would have been incurred, if the general rule, that a knowledge of the law in civil cases shall be presumed, where there is a full knowledge of the facts, had been permitted to operate; that was an attempt to charge the party with a fraudulent concealment of title in the absence of actual knowledge, upon the legal presumption which imputed knowledge. *Ib.*

**IMPROVEMENTS OUT OF THE WATER UNDER THE ACT OF 1745, CH. 9, SEC. 10. See RIPARIAN PROPRIETOR.****EJECTMENT.****INDICTMENT.**

1. An indictment under the act of 1817, ch. 227, section 1, should allege the names of the slave and his master if known; if unknown, the fact should be so averred; and also, that there was no license in existence authorizing the slave to remain in the retailer's store, &c., within the period prohibited by the said act. It is not a compliance with the act merely to allege the slave not having a written order or license from his master. The non-existence of a license is an essential ingredient in the offence. *State vs. Nutwell*, 54.

**INFANCY—INFANTS.**

1. Parties who take possession of the personal property of infants, and retain and use the same, will be considered in equity as those who enter upon and use their real estate, treated as guardians, and liable to account accordingly. *Chaney vs. Smallwood*, 367.
2. Where a father died, having in his possession slaves belonging to his children, his widow, as his administratrix, took possession of them, held and claimed them as her own; while the children were minors, she married again, and the retention and use of the property was continued by the second husband and wife, until her death, and by him until the time of the decree. HELD: that in equity he is only responsible for the conversions and hires accruing after the time of his marriage with the administratrix. *Ib.*

**INNKEEPER. See JURISDICTION, 1.****INSOLVENT DEBTOR.**

1. A release under the insolvent laws pleaded and relied upon as a defence in bar of the action, and upon an issue joined on a denial of the truth of the plea, when offered in evidence, is said to come incidentally in question. *Bowie vs. Jones*, 208.

INSOLVENT DEBTOR—*Continued.*

2. The jurisdiction of the county courts in relation to insolvent debtors is limited, but in support of a release under the acts relating to them, all that is necessary to be shown, is that the case made by the record of the release is within the limited jurisdiction, and then the judgment would be just as obligatory and conclusive as if the judgment were one of a court of general jurisdiction. *Ib.*
3. The release of an insolvent debtor is an exception to the principle, that where the course of procedure is pointed out by statute, the proceedings must show their conformity with the act by which they are authorised. *Ib.*
4. Under the act of 1805, ch. 110, the presentation of a petition by a party in confinement was alone necessary to give jurisdiction, and since the proof of confinement has been dispensed with by the act of 1830, ch. 130, the jurisdiction of the county court attaches by the presentation of a petition such as is prescribed by the acts in relation to insolvent debtors. *Ib.*
5. A single judge is empowered to act upon the petition of an insolvent debtor in the recess of the county court, and hence the application for relief made in conformity to the statutes, is depending in point of law, from the time of its presentation to the judge, though not filed with the clerk of the court. *Ib.*
6. Either the county court, or a judge thereof in the recess of the court, may grant a personal discharge, appoint a trustee, and take a bond. *Ib.*
7. Where the release of an insolvent debtor comes incidentally in question, it cannot be avoided upon the ground, that the insolvent had a prior application depending at the time of the one under which he obtained his final discharge. *Ib.*
8. An action against husband and wife, founded on the note of the wife, made by her while sole in *Louisiana*, is not barred by her release before marriage, and after the maturity of her note, under the insolvent laws of *Maryland*. *Nelson and wife vs. Bond*, 218.
9. To vacate a deed by the insolvent laws existing anterior to the act of 1834, ch. 283, the grantors, at the time of executing the deed, must have contemplated taking the benefit of the insolvent laws; otherwise, the deed could not therefore be condemned as made with a view or under an expectation of being and becoming an insolvent debtor, and with intent thereby of giving an undue and improper preference. *Cole vs. Albers and Runge*, 412.
10. A deed made at the request of the creditor, prior to the act of 1834, was not within the meaning of our insolvent laws. *Ib.*
11. The act of 1834, ch. 293, so far as it authorises the courts to vacate conveyances made in contemplation of insolvency, is a local law confined to the city and county of *Baltimore*, and does not apply to cases where the grantee had not notice of the insolvent condition of the grantor. *Ib.*
12. Where, after the execution of a deed of mortgage, the mortgagor lends



**INSOLVENT DEBTOR—Continued.**

money and sold goods to the mortgagee, and took notes for the payment of his debt, in semi-monthly instalments, this is evidence that he did not know his debtor to be in an insolvent condition. *Ib.*

13. The notice required by the act of 1834, to vitiate a conveyance is not a technical or constructive notice, but an actual notice derived from a knowledge of the condition of the grantor of such conveyance. *Ib.*
14. At common law a debtor has a right to prefer one creditor to another, and, independent of our statute in relation to insolvent debtors, may give such preference. *Ib.*

**INSTRUCTIONS TO JURY.**

*See PRACTICE, AND PRACTICE IN COURT OF APPEALS.*

**INTEREST.**

1. Where the landlord resorts to a distress to recover rent, he is not entitled to interest on the sum in arrear. *Longwell and Ege vs. Ridinger, 57.*
2. Upon a note made in *Louisiana*, bearing ten per cent. interest until paid, this court will enter judgment accordingly. *Nelson & wife vs. Bond, 218.*
3. Where the plaintiff exhibits a claim for principal, and with interest added, up to a given day, it is error in the county court to enter up a condemnation for the gross sum as bearing interest from the day on which the attachment issued. The charge of interest upon the interest was not warranted under such circumstances. *Boarman vs. Israel & Patterson, Ex'rs, 372.*

**JUDGMENT.**

1. The jurisdiction of the county courts in relation to insolvent debtors is limited, but in support of a release under the acts relating to them, all that is necessary to be shown, is that the case made by the record of the release is within the limited jurisdiction, and then the judgment would be just as obligatory and conclusive as if the judgment were one of a court of general jurisdiction. *Bowie vs. Jones, 208.*
2. Where the jurisdiction of a court once attaches, and the court proceeds to final judgment, the same judgment, coming incidentally in question, is to be respected. *Ib.*
3. A judgment on attachment which not only condemns property towards satisfying that portion of a plaintiff's demand which might be recovered under the short note, but also to satisfy that which could not be so recovered, is erroneous. *Boarman vs. Israel and Patterson, Ex'rs, 372.*

*See INSOLVENT DEBTOR.*

ORPHANS COURT, 1, as to effect of—of appellate court on appeal from orphans court.

**JUDICIAL SALES.**

1. Courts of justice guard and maintain with jealous vigilance the titles of purchasers acquired under judicial sales. *Tomlinson vs. Devore, 345.*

JURIES AND JURORS. *See* JURISDICTION, 5, 6. PRESUMPTION OF LAW, 9.  
JURISDICTION.

1. In an action against an innkeeper, for negligently taking care of the plaintiff's horse in his stable, so that he was killed, the damages claimed exceeded fifty dollars. *HELD*: that the county court had jurisdiction of the action. *O'Reilly vs. Murdock*, 32.
2. Where commissioners are appointed under an Act of Assembly by the courts to take proof between parties, no rule of court can transfer powers to the commissioners, designed by the act to be exercised by the courts or the judges thereof. *Mitchell vs. Mitchell*, 66.
3. Acts of Assembly made relative to the administration of justice are to be liberally construed for the attainment of that important object. *Ib.*
4. It is the province of courts of justice to expound laws and not to legislate. *Ib.*
5. The court is the proper tribunal to construe and determine the legal effect and construction of instruments of writing: but where deductions are to be drawn from the conduct of parties in the execution of such instruments, at the time, in the manner, and under the circumstances existing in the case, the jury are the proper forum to make such deductions. *Keefer vs. Mattingly*, 182.
6. It is the province of the jury to decide all questions of fact of which evidence legally sufficient for that purpose is laid before them, and it is equally the right and duty of the court to decide all questions of law arising upon the facts, when found and ascertained by the jury. *Conolly vs. Kettlewell and Wilson*, 260.
7. The courts of common law in *Maryland* have jurisdiction in cases involving the rights of lunatics, unless they have been ousted by the act of 1785, ch. 72, and its supplements. *Tomlinson vs. Devore*, 345.
8. The act of 1785, ch. 72, contains no express ouster of the jurisdiction of the courts of common law, and hence they have concurrent jurisdiction over the rights of lunatics with the Court of Chancery. *Ib.*
9. To divest courts of general jurisdiction of their jurisdiction, terms to that end must be employed in the statutes intended to accomplish such a purpose, and it cannot be effected, unless by express terms, or by necessary implication. *Ib.*
10. Where a special limited jurisdiction, distinct from and not embraced by its general jurisdiction, is conferred by act of Assembly on any tribunal, its powers to act as it has done must appear upon the face of its proceedings. *Boarman vs. Israel and Patterson, Ex'rs*, 372.
11. When those proceedings are brought for review in this court, it must appear from their inspection, that every thing has been done which the law required, as the basis of the authority which has been exercised. *Ib.*
12. The act of 1825, ch. 117, interposes no obstructions to enquiries into such a subject. It has no application to them. *Ib.*

*See* CONSTRUCTION OF STATUTES.

JUSTICES OF THE PEACE, 1 to 10, 11, 12.

## JUSTICES OF THE PEACE.

1. The act of 1791, ch. 68, gives jurisdiction to justices of the peace, where the real debt and damages do not exceed ten pounds, current money, or one thousand pounds of tobacco. *O'Reilly vs. Murdoch*, 32.
2. The act of 1809, ch. 76, gives jurisdiction to the justices of the peace, in all cases where the real debt and damages doth not exceed the sum of fifty dollars. *Ib.*
3. Both these acts, in defining jurisdiction, refer not to the sum claimed, but to the sum recovered, as the standard by which it was to be regulated. *Ib.*
4. By the act of 1813, ch. 162, the sphere of the justices power was extended to trespasses upon real property, by cutting, destroying or carrying away timber or wood from off any land where the damage should not exceed the sum of fifty dollars. The test of jurisdiction here also is the sum recovered. *Ib.*
5. By the act of 1824, ch. 138, jurisdiction is given to the justice to injuries over real property, for which t. q. c. f. might be maintained, and where the damages "*laid or claimed*" should not exceed fifty dollars. *Ib.*
6. The act of 1825, ch. 51, extends the jurisdiction of justices to trespasses of either real or personal property, where the *damages claimed or laid* shall not exceed the sum of fifty dollars. *Ib.*
7. The act of 1834, ch. 296, gives jurisdiction to justices of the peace, in all cases where the debt or damages "*laid or claimed*" shall not exceed the sum of fifty dollars, excepting from the operation of that act, actions of slander, assault and battery, and where titles to land shall come in question. *Ib.*
8. The act of 1824 first introduced a new test of jurisdiction, by making it to depend upon the damages claimed or laid, and from that time all subsequent laws providing for the recovery of damages, have adopted the same standard. *Ib.*
9. If a plaintiff estimates his damages at a sum not exceeding fifty dollars, jurisdiction is given to a single magistrate, because the sum recovered cannot exceed the sum claimed; but where the nature of the injury is such as to justify a claim of damages to a larger amount in his declaration, the established jurisdiction of the county court is not taken away. *Ib.*
10. These views are not to be considered as in any respect applicable to cases of contract, but are intended to be confined to actions for torts. *Ib.*
11. Under the act of 1835, ch. 201, the county court has jurisdiction in an action on the case, for overflowing the plaintiff's land, by reason of obstructions suffered to remain in defendants' mill-race, where the damages laid were above one hundred dollars, though the verdict was for a less sum. *Beall vs. Black*, 203.
12. In cases of contract the sum recovered, and not the matter put in demand, is made to decide the question of jurisdiction. The language is where the debt or damages do not exceed one hundred dollars. *Ib.*



LACHES. *See* ACCOUNT STATED, 2.

## LANDLORD AND TENANT.

1. Where the administrator of a deceased tenant continues the tenancy of his intestate until after the death of the landlord, the owner of the fee, the rent due up to the last day of payment prior to the landlord's decease, might have been distrained for by him, and is therefore a preferred claim upon the assets of the deceased tenant found upon the premises, under the act of 1836, ch. 192. *Longwell & Ege vs. Ridinger*, 57.
2. Where the landlord resorts to a distress to recover rent, he is not entitled to interest on the sum in arrear. *Ib.*
3. For rent due and payable at the landlord's death, his administrator may claim a preference to be paid out of the assets of his deceased tenant, where the claim conforms to the act of 1836, ch. 192. *Ib.*
4. The remedy by distress for rent in arrear is not within the act of limitations. *Ib.*

## LAND OFFICE.

1. Extracts from record books deposited in the land office, showing the name and rank of grantee, and number of the lot and acres, with a particular description of such lot as surveyed, to which an officer or soldier of the Revolution was entitled, which books purport to have been made under the authority of the act of 1788, ch. 44, with a certificate from the register of the land office, under his seal of office, that the same have been carefully collated and compared with the original record books from which they were respectively taken, and agreed therewith, are sufficient evidence to show title in the person named in such extracts, to the lot therein described. *Lee vs. Hoye*, 188.
2. An escheat grant is *prima facie* evidence of title, and is available for that purpose until the contrary is proved. *Ib.*
3. It is not necessary nor usual, according to the practice of the land office, to state on the face of an escheat patent whose lands were escheated, or the facts and circumstances which show that the lands were escheatable. *Ib.*
4. A patent which professed to grant, as escheat, several parcels of land which it described, with contiguous vacancy, cannot include, as such vacancy, another parcel of land which appeared to have been theretofore granted by the State, and not enumerated as one of the parcels escheated. *Ib.*
5. The court will not instruct the jury after a lapse of seventeen years merely, to presume the death of the patentee of land. *Ib.*
6. A death of a patentee will not be presumed to support a title to land, acquired in violation of the law, and rules of the land office. *Ib.*
7. Before a title can be acquired in lands liable to escheat, the rules of the land office require that two-thirds of the value of the land be paid to the State. *Ib.*
8. A warrant of resurvey should be founded upon a siezin in fee in the lands upon which the resurvey is to be made. *Ib.*

LAND OFFICE—*Continued.*

9. A certified copy of the rent-roll, extracted from the debt books of the Lord Proprietary, under the hand and seal of the Register of the Land office, having relation to the possession of the tract of land claimed in an action of ejectment, is competent evidence for the defendant in all cases of controverted possession, or when possession is relied on as evidence for the presumption of a grant. *Casey's lessee vs. Inloes et al*, 430.
10. The rent-rolls are books which were kept in the several counties of the State, during the Proprietary Government, by officers called rent-roll keepers, and were designed to show, in the respective counties, the grants of land made by the Lord Proprietary, the names of the subsequent alienees thereof, of those who were in possession of the same, and the quit-rents with which they were chargeable. *Ib.*
11. An escheat patent is conclusive evidence of the fact of an escheat grant. *Ib.*
12. Extracts from the rent-rolls may tend to disprove possession under an escheat patent, in a particular person, at a given period, by *not* showing that such person, at such period, was in possession, nor that quit-rents were charged to him on account of such escheated lands, as also by showing that others were charged therefor. *Ib.*
13. Upon an escheat the State takes as the *ultimus hæres* of that, to which, the person was entitled, whose death, without heirs, created the escheat. *Ib.*
14. An escheat grant, in one sense of the term, is the creation of a *feudum novum*; the grantee takes the property granted as a new fief or feud, so far as regards his relationship, obligations, and duties to the *State*, and the estate, upon the terms specified in the grant. *Ib.*
15. But the limits, privileges, appurtenances, and priorities of the estate granted by escheat patent, and the liens and incumbrances to which it may be subjected, exist independently of the inquiry, whether the grant be of an ancient or a new feud. *Ib.*
16. The State acquires by escheat, not only that which was originally granted, but all the rights, privileges, priorities and appurtenances incident to the land itself, and with which it was held by the person who died seized without heirs. *Ib.*
17. The escheat grantee, upon the terms specified in his grant, takes the estate granted in the same condition in which it may have devolved on the State, except so far as it may be affected by the doctrine of merger or extinguishment. *Ib.*
18. An escheat grant relates to the original grant, and passes to the escheat grantee all that passed to the original grantee, and which was held by him, whose death, without heirs, occasioned the escheat. *Ib.*
19. The relation of the escheat grant to the original grant is not intercepted by an intermediate patent, unless, at the time of granting the same, the escheat right had accrued. *Ib.*
20. Until the occurrence of the event which constitutes the escheat, the interest of the Lord Proprietary in relation to it, was a mere possibility, and could not be the subject of a grant. *Ib.*

LAND OFFICE—*Continued.*

21. The doctrine of estoppel does not apply to grants made by the State. They only pass the title which the State had at the time of the grant, and not that subsequently acquired. *Ib.*
22. An escheat grant is *prima facie* evidence that the land granted is liable to escheat, at the date of issuing the escheat warrant, and not antecedently. *Ib.*
23. A grant, though for the most part covered with water, still passes to the grantee all the soil under the water, included within its outlines, with all the rights of property incident thereto, subject only to the rights of the public as to fishing and navigation. If encroached on, the grantee may maintain trespass or ejectment. *Ib.*
24. The act of 1745, ch. 9, never was designed to give one land-holder the power of extending his improvements over the land of another. *Ib.*
25. The right of the riparian proprietor to extend his improvements into the water, is intercepted by a grant from the State to another person of the land covered by the water of a navigable stream, over which such proprietor might otherwise have been entitled, under the act of 1745, to make improvements. *Ib.*
36. The heir of lessee for a term of years of a lot bordering on the water, under the act of 1745, ch. 9, sec. 10, is not the riparian proprietor of such lot. *Ib.*

*See* RIPARIAN PROPRIETOR.

## LEGACY—LEGATEE.

1. After a decree to account, on a bill filed by a residuary legatee against an executor, upon a creditor filing a claim, it is competent for the residuary legatee to plead the act of limitations. *Bowling and wife vs. Lamar, adm'r, 358.*
2. But as to proceedings *at law* by a legatee, distributee or creditor, whether competent for them to defeat the claims of creditors of the deceased, by the plea of limitations, this court intimates no opinion. *Ib.*
3. Where there is a bequest of slaves for life, and of freedom after the death of the tenant for life, a clause in the will declaring forfeiture of freedom in case of running away and a sale for life upon their apprehension, is designed for the benefit of the tenant for life, to secure the good conduct of the slaves, and the proceeds of any such slave sold for absconding, in the absence of any provision to the contrary by the testator, will belong to the legatee for life. *Jones vs. Earle Ex. of Jones, 395.*
4. Where the testator directed the sale of all his real and personal estate, and disposed of the proceeds of sale, and all the residue and remainder of his estate generally, the one moiety to trustees for the benefit of his wife and children in the manner specified in his will, and the other moiety to trustees for the benefit of the complainants, if, from any cause, the legacy to the wife lapsed, it could not sink into the general residue. *Darrington vs. Rogers, 403.*
5. Where a testator divided the residue of his estate into moieties, and devised them to two distinct classes of devisees, one of them his chil-



LEGACY—LEGATEE—*Continued.*

dren and heirs-at-law, the other collateral relations, but directed that his widow should have a portion of the moiety given to the children in lieu of dower, and she renounced the will, her portion will be deducted from the moiety given to the collateral relations, as the legacy to her, in consequence of her renunciation, becomes a residuum unaffected by any testamentary disposition, and as such vests in the testator's heirs or next of kin. *Ib.*

*See* EXECUTOR AND ADMINISTRATOR.

ORPHANS COURT, 4, 5, 11, 12.

LEGISLATURE. *See* CONSTITUTIONAL LAW.

## LIMITATION OF ACTIONS.

1. The act of limitations does not apply to the claim of an executor against his testator, who retained for his debt. He could institute no suit at law against himself. *State use of Stevenson vs. Reigart*, 1.
2. The remedy by distress for rent in arrear is not within the act of limitations. *Longwell and Ege vs. Ridinger*, 57.
3. P, at a public sale of land, the bidding being dull, said, buy the land gentlemen; buy the land D; I will burst the deeds from N; I will give you a good title; and will put you in possession of the land; it shall not cost you a cent. Under such representations D bought the land and paid for it in 1826. In an action brought in 1840, by D, against P, to recover back the purchase money, upon the ground that P had failed to vacate the incumbrances and put D in possession, there being no proof of any proceedings on the part of P, nor that he had given possession. *Held*: that the action was barred by limitation. *Duvall vs. Peach*, 172.
4. To remove the bar raised by the statute of limitation, there must be such an acknowledgment of a subsisting debt, as is equivalent to an express or implied assumpsit, or promise to pay. *Ib.*
5. The plea of limitations is classed among those not deemed meritorious, and in relation to the reception of which, courts of justice act with care and strictness, and must be filed by the rule day. *Nelson & wife vs. Bond*, 218.
6. A general continuance of a cause does not enlarge the time to file the plea of limitations. *Ib.*
7. A party who receives money as a *quasi* trustee, as for the use of those to whom it belonged, not as acting under a continuing or express trust; whose duty it is to pay over immediately on its receipt, is liable to an action at law, and the act of limitations begins to run from the time of the receipt. *Berry vs. Pierson*, 234.
8. Where a legatee interposes the plea of limitations to the final passage of an administrator's account of the payment of the assets of the estate to creditors, no decree or order which the orphans court might pass in the premises, would divest the courts of law of jurisdiction over the same subject matter; and the fact of the administrator being a creditor, claimant, does not change the nature of the case. *Bowling and wife vs. Lamar, adm'r*, 358.

LIMITATION OF ACTIONS—*Continued.*

9. The plea of limitations (technically considered as such,) is not applicable to proceedings before the orphans court, in relation to the claims of creditors. That court may look to the fact of such a bar as evidence to be weighed with all other testimony, in relation to any claim, in determining its justice, and the propriety of passing or rejecting it. *Ib.*
10. As to proceedings *at law* by a legatee, distributee or creditor, whether competent for them to defeat the claims of creditors of the deceased, by the plea of limitations, this court intimates no opinion. *Ib.*
11. A prevalent opinion, in the neighborhood of the premises claimed in an action of ejectment, even if known and adopted by the lessor of the plaintiff, as to her legal rights, whether founded in error or not, does not, at law, prevent the running of the statute of limitations, nor repel the legal presumption of a grant arising from long continued, and acquiesced in, adverse possession. *Casey's lessee vs. Inloes et al*, 430.
12. The general principle is well established, that possession of a part of a tract or parcel of land, by him who is legally entitled to the entirety, carries with it possession to the extent of his legal rights; and no wrong-doer can, in contemplation of law, by entry, or the exercise of acts of ownership thereon, acquire the possession of any part thereof, but by actual enclosure, or ouster, actual or presumptive. *Ib.*
13. By the act of 1745, ch. 9, sec. 10, "all improvements, of what kind soever, either wharfs, houses, or other buildings, that have or shall be made out of the water, or where it usually flows, (as an encouragement for such improvers,) be forever deemed the right, title and inheritance of such improvers, their heirs and assigns forever." In the year 1698, a patent issued for a parcel of land called *M's Neck*, lying in *Chesapeake Bay*, and on the *N.* side of a river called *Patapsco*, and on the *N.* side of the *N. W.* branch of said river: Beginning at a marked red oak by a little branch, and running up along the *N. W.* branch, for breadth, *W. N. W.* 100 p. over a cove unto a marked white oak, &c.  
**HELD:**
  - 1st. That the patentee of this land, and those claiming under him, had by virtue of the act of 1745, a mere privilege of acquiring property by its reclamation from the water; that until reclaimed, she had no property; no possession; no right, under that act.
  - 2nd. That a party, by erecting a fence for thirty years and upwards, on a part of the low grounds adjacent to such tract designated as the cove, in front of that part of *M's Neck* claimed by the plaintiff, which was covered by the flow of the tide, and claiming below it, did not furnish evidence of such an uninterrupted, continuous possession, as was essential to the presumption of a grant to the person making and extending such fence.
  - 6th. A party in possession of land adjacent to a navigable stream, who runs a fence from his land into the stream, across the front of another adjacent proprietor, gains no possession by such an act, which is in itself a trespass. *Ib.*

LIMITATION OF ACTIONS—*Continued.*

14. Upon every discontinuance of the possession of a wrong-doer, by operation of law the possession of the rightful owner is restored, and nothing short of an actual, adverse and continuous possession for twenty years can destroy his right, or vest a title in the wrong-doer. *Ib.*

See PRACTICE IN CHANCERY, 3, 4.

## LIMITED JURISDICTION. See EVIDENCE, 43.

INSOLVENT DEBTOR.

JUDGMENT.

## LUNATICS.

1. The courts of common law in *Maryland* have jurisdiction in cases involving the rights of lunatics, unless they have been ousted by the act of 1785, ch. 72, and its supplements. *Tomlinson vs. Devore*, 345.
2. The act of 1785, ch. 72, contains no express ouster of the jurisdiction of the courts of common law, and hence they have concurrent jurisdiction over the rights of lunatics with the Court of Chancery. *Ib.*
3. Upon a judgment, execution and sale, the title to land passes, though the defendant in the judgment was a lunatic at the time of its rendition. *Ib.*

## MAYOR AND CITY COUNCIL OF BALTIMORE.

1. The *Mayor and City Council of Baltimore* by their charter, have full power to pass all laws and ordinances necessary to preserve the health of the city, prevent and remove nuisances, and prevent the introduction of contagious diseases within the city, and within three miles of the same. *Harrison vs. M. & C. C. Co. Balt.* 264.
2. That act clothed the corporate authorities *within the specified limits*, with all the legislative power which the General Assembly could have exerted, and of the degree of necessity for such municipal legislation, the M. and C. C. of B. were the exclusive judges; the means and manner contributory to the end in view, were committed to their sound discretion. *Ib.*
3. The corporation might impose penalties, or cause the vessel and all persons on board to be taken possession of, and controlled until their disinfection was effected, and impose on the captain, owner or consignee, reimbursement of all expenses incurred, or they might adopt at the same time both those remedies. *Ib.*
4. In an action to recover the expenses incurred by the *Mayor and City Council of Baltimore*, in disinfecting and purifying a vessel, persons, and baggage, on board her at the time of her arrival, from the infection of the small pox, the defendant cannot require the court to instruct the jury, that the recovery must be limited to the amount of expenses absolutely necessary to preserve the health of the city, or to prevent the introduction of the small pox. By such an instruction the rights of the plaintiff would have been unreasonably and illegally restricted. *Ib.*
5. If the Health officer of the city, on whom the duty of disinfection is imposed by the ordinances of the corporation, in causing expenses to be incurred, acted *bona fide* within the limits of a sound discretion



**MAYOR AND CITY COUNCIL OF BALTIMORE—Continued.**

- and with reasonable skill and judgment in this discharge of his official duties, the reasonable expenses thus incurred by him, must be paid by the captain, owner or consignee of the disinfected vessel as declared by the ordinances of the city on such subjects. *Ib.*
6. The Health officer in his disposition of persons on board of an infected ship, under the ordinances of the city, must send the persons laboring under the infectious disease to the hospital, and may also send those on board the same vessel, liable to be affected by it, to the hospital, if in his opinion such course be necessary to prevent the spread of the disease. *Ib.*
  7. And that officer, acting with reasonable skill and judgment, and with a sound and honest discretion in relation to such persons not apparently afflicted with the disease, renders the owner, master or consignee, also, liable for the reasonable expenses incurred as in other cases. *Ib.*

**MERGER.** See **CONTRACT.**

**MILITARY GRANTS TO REVOLUTIONARY SOLDIERS.**

See **LAND OFFICE, 1.**

**MORTGAGE, MORTGAGOR AND MORTGAGEE.**

1. Where the consideration stated in a mortgage is a sum of money in hand paid, and it is taken to secure that sum, evidence is admissible to show a part of the sum paid, and that it was to secure advances made, and to be made, to that extent. Such evidence would not affect the nature of the deed. It would still be founded on a money consideration. *Cole vs. Albers and Runge, 412.*
2. Such evidence is also admissible to rebut the idea of fraud, by showing the same kind of consideration, differing only in amount, and the circumstances under which it assumed this shape. *Ib.*
3. The design of the act of 1825, ch. 50, was to prevent liens on property to the prejudice of creditors, for amounts and claims never contemplated by the parties at the time of the execution of their mortgage, of which the mortgage, by its terms, gave no notice. *Ib.*
4. A deed executed to cover a mortgagee against all future liabilities of any and every description, which the mortgagor might incur or be responsible for to the mortgagee, would be within its provisions. *Ib.*

**MUNICIPAL CORPORATION.** See **MAYOR AND C. C. OF BALTIMORE.**

**NAVIGATION—Right of—**See **LAND OFFICE, 23.**

**RIPARIAN PROPRIETOR.**

**NEGROES AND SLAVES.**

1. A bequest of freedom to slaves, as they arrived at a particular age, is not a legacy to them; nor, when it is granted upon condition of good behavior, will its forfeiture create a lapse, though the bequest of freedom is defeated, the right of the slave after forfeiture, nor to his proceeds after a sale, not being expressly bequeathed to any person. *Jones vs. Earle Ex. of Jones, 395.*

## NOTARY PUBLIC.

1. The act of 1837, ch. 253, was designed to extend the credit which, by the courtesy of commercial nations, had been given to the certificate of a notary public. *Whiteford vs. Burckmyer & Adams*, 127.
2. The certificate of a notary public had been received as *prima facie* evidence of the presentment by him for acceptance or payment, and of his protest of the bill for non-acceptance or non-payment. *Ib.*
3. The act of 1837, ch. 253, extends this doctrine as well to inland as to foreign bills or notes, as to notice sent or delivered in the manner stated in the protest. *Ib.*

NOTICE. See *BILLS OF EXCHANGE*, 1, 2, 13, 19, 20.  
EVIDENCE, 27.

NUISANCE. See *MAYOR AND C. C. OF BALTIMORE*.

## ORPHANS COURT.

1. Where the orphans court, upon an application of a creditor of a deceased person, and the exhibition of the proof of his demand, passes a claim to be allowed, if paid by the executor or administrator, and upon appeal that order is reversed, such reversal constitutes no bar to the recovery of the same claim at law. The orphans court possessed only a *prima facie* jurisdiction, and the exercise of the appellate jurisdiction did not increase its effect. *State use of Stevenson vs. Reigart*, 1.
2. A release to an administrator and his sureties may be legally recorded in the orphans court of the county where letters of administration were granted, and a copy certified by the Register of Wills of the same county, is competent evidence. *Mitchell vs. Mitchell*, 66.
3. The Register of Wills is authorised and bound to record administration accounts proved and passed, and a copy under his official seal is competent evidence. *Ib.*
4. Where a legatee interposes the plea of limitations to the final passage of an administrator's account of the payment of the assets of the estate to creditors, no decree or order which the orphans court might pass in the premises, would divest the courts of law of jurisdiction over the same subject matter; and the fact of the administrator being a creditor, claimant, does not change the nature of the case. *Bowling and wife vs. Lamar*, 358.
5. The plea of limitations (technically considered as such,) is not applicable to proceedings before the orphans court, in relation to the claims of creditors. That court may look to the fact of such a bar as evidence to be weighed with all other testimony, in relation to any claim, in determining its justice, and the propriety of passing or rejecting it. *Ib.*
6. The right to interpose the plea of limitations to claims against a deceased's estate, *before the orphans court*, is vested in executors and administrators by our testamentary system. *Ib.*
7. The fact that the orphans court has endorsed the claim of an administrator against his intestate's estate, to be allowed when paid, will

ORPHANS COURT—*Continued.*

not prevent the residuary legatee from objecting, before the same court, to the justice of the demand, and requiring full proof of its existence prior to the ratification of the administration accounts, in which he seeks an allowance of his demand as paid. *Ib.*

8. For want of full proof when demanded, the orphans court may reject any claim against a deceased's estate, after it has been passed and before payment. *Ib.*
9. The case of *Lee vs. Lee and Welsh*, 6 G. & J. 316, is not in conflict with *Stevenson et al. vs. Shriver and wife*, 9 G. & J. 324. In the latter case, this court considered the *prima facie* effect of the order of the orphans court, when passed, as evidence coming in collaterally, while in the former cause the question was, whether the orphans court, acting *de novo*, ought to pass such an order at all. *Ib.*
10. The orphans court passed certain claims against a deceased's estate, when the administrator came to settle his administration account, the claims were objected to, and full proof of them demanded, but the court allowed them. Upon appeal, this court reversing the decision of the orphans court, remanded the cause without prejudice, with liberty to take further proof. *Ib.*
11. After a period of near fifteen years, in the absence of all proof to the contrary, the orphans court, in reviewing the proceedings of an executor, should assume the payment of all debts and legacies. This presumption rests on the duty of the executor, and his due discharge of it.—*Gardner and Hughes ex'rs vs. Simmes*, 425.
12. As to legacies bequeathed to an executor, the law will assume that he holds as legatee, after the lapse of a sufficient period allowed for the settlement of the estate. What would be regarded such a period, might depend on the peculiar circumstances of each case. *Ib.*
13. The acts of 1798, ch. 101, and 1820, ch. 161, confer jurisdiction on the orphans court to coerce the delivery over of property, or *choses in action*, or payment of money, by the representative of the executor or administrator to the administrator d. b. n. of the first deceased, only in case, the property, *choses in action* or money, belonged specifically to the deceased while alive, and remained in the hands of the executor and administrator as such, and not as legatee; or in case the *chose in action*, &c., was received by the executor or administrator in that capacity, and was so retained until his death. *Ib.*
14. In such cases the orphans court may decree the delivery up of the specific property, so retained, but cannot decree its nominal or estimated value. *Ib.*

See EXECUTOR AND ADMINISTRATOR.

## PART PERFORMANCE IN EQUITY.

See COURT OF CHANCERY, 18, 19, 20, 21.

PATENTS. See LAND OFFICE.

## PLEAS AND PLEADING.

1. Where a verdict is rendered for the plaintiff on two counts in a declaration, one of which contains no cause of action, the court will



PLEAS AND PLEADING—*Continued.*

- render judgment upon the other if legally sufficient. *Gordon vs. Downey*, 41.
2. The act of 1809, ch. 164, declares that judgment shall not be stayed after verdict for defect of any count in a declaration, where there is a good count. *Ib.*
  3. Where a verdict is set aside and a new trial awarded, the case, as far as amendments are concerned, stands as if no trial had been had. *Ib.*
  4. An application for amendment of pleadings is not a demand of a matter of right, but is an appeal to the sound discretion of the court, and to be granted when it shall appear necessary to bring the merits of the question between the parties fairly to trial. *Ib.*
  5. Where the county court awards a new trial, it has power to authorise an amendment of the pleadings under the act of 1785, ch. 80, sec. 4. *Ib.*
  6. Certainty to a reasonable extent, is an essential attribute of all pleadings, both civil and criminal, but is more especially so in the latter, where conviction is followed by penal consequences. *State vs. Nutwell*, 54.
  7. One of the objects of certainty in pleading is notice to the party of the nature of the charge against which he is to come prepared to defend himself; another to enable the court to pronounce the sentence of the law, and the party to defend himself against a second prosecution for the same crime, by pleading a prior acquittal or conviction. *Ib.*
  8. A declaration that the defendant is indebted in the sum of, &c., for land called, &c., containing, &c., before that time bargained and sold, delivered and conveyed, by deed bearing date, &c., by the plaintiff to the defendant, and being so indebted, in consideration thereof, undertook and promised, &c., is sufficient to maintain a demand for unpaid purchase money. *Wolfe vs. Hauver*, 84.
  9. After verdict, upon motion in arrest, the court will presume that sufficient proof was offered to the jury, to enable them to find all the allegations in the pleadings, substantially necessary to support the claim of the plaintiff. *Baden et al vs. State use of Clark*, 165.
  10. The objection that the breaches assigned upon the record, are not sufficiently specific, in stating the names of parties for whom levies were made, and the amounts levied for each person, cannot avail on a motion in arrest. *Ib.*
  11. Where the assigned breaches are not sufficiently specific, after issue joined upon them the defendant may claim a bill of particulars, to enable him to prepare his defence. *Ib.*
  12. A demurrer is a direct attack on the pleadings themselves, whereon the court must of necessity inspect all the pleadings in the case, as well to enable it to ascertain the sufficiency of the particular pleading demurred to, as in giving its judgment thereon to mount up to the first material error in pleading. *Leopard vs. C. & O. Canal Co.* 222

PLEAS AND PLEADING—*Continued.*

13. Upon a motion in arrest of judgment the court have no means of judging of the validity of a verdict, but by referring to the pleadings and issues in the cause. *Ib.*
14. Where, on a collector's bond, the breach assigned by the State was the non-payment into the Treasury of the taxes received, and the defendants pleaded general performance by the collector, and no assessment imposed by commissioners of the county, on which pleas issues were joined, and the jury found that the defendants did not owe the State any sum, as the State hath within by its pleadings alleged. **Held:** that the verdict was defective in not finding the matters put in issue by the pleadings, and no judgment could be entered upon it. *State vs. Carlton et al*, 249.
15. Where an original contract has been rescinded by the parties after it has been performed in part, either by a waiver of the performance of the balance of the contract, or entering into a new one so inconsistent with the first as to be wholly irreconcilable with it, in such case a recovery may be had for the part performance on a general count; but not by declaring on the contract itself. *Howard vs. Wilmington & Sus. R. R. Co.* 311.
16. It is a rule in pleading, that each party tacitly admits all such traversable allegations on the opposite side, as he does not traverse. *Ib.*
17. In July 1836, the plaintiff contracted with the defendant, to construct a rail road according to certain specifications, to complete one mile by the 15th October, and the residue by the 1st of November following. The defendant agreed to pay in monthly payments, according to the measurement and valuation of his engineer, retaining from each payment fifteen per cent., until the final completion of the work, and was authorized in certain cases to declare the contract forfeited, from which the plaintiff should have no appeal. The plaintiff averred, that he diligently prosecuted his work, &c., until the 17th September, when he was prevented by a writ of injunction, served on him, until the 30th October, from going on; that the engineer of the defendant had not complied with his duty, stating the particulars of his breach thereof under the contract; that he proceeded after the 1st November, under the orders of the defendant to prosecute the work until the 19th January, and the work done under the agreement in December, 1836, was estimated by defendant's engineer, at, &c., which sum not being paid, the defendant, on the 19th January, fraudulently, and for the illegal purpose of imposing better terms on the plaintiff, &c., declared the contract forfeited. The defendant pleaded, that the contingencies (stating them) on which the right to forfeit the contract depended, had occurred, and that on the 19th January, he had in virtue of his reserved power, forfeited the agreement. To this the plaintiff demurred generally. **Held:**

1. That the breaches of the contract, not denied by the plea, were admitted.

PLEAS AND PLEADING—*Continued.*

2. That the illegal and fraudulent purposes, for which the contract was alleged to have been annulled, was also admitted.
3. That the annulling the contract under the circumstances, was a breach thereof.
18. Where a contract is broken, the plaintiff will be entitled to some damages, whether they be stated or not. *Ib.*
19. Damages are implied from a breach of contract. *Ib.*
20. Wherever damages necessarily and naturally arise from the breach complained of, and may therefore be implied, they need not be stated; otherwise they must, to prevent surprise. *Ib.*
21. Where a breach of contract is relied on, from which damages necessarily and naturally arise, the general conclusion, that the plaintiff has sustained damage in, &c., is sufficient to all the counts in the declaration, and obviates the necessity of charging damages generally in each one of them. *Ib.*
22. Where the short note states a cause of action in assumpsit, and the writ issued was in trespass upon the case, matters for which debt or covenant was the only remedy could not be recovered. *Boarman vs. Israel and Patterson, Ex'rs*, 372.
23. A short note cannot be amended from assumpsit, to debt or covenant, where the writ is in trespass upon the case. *Ib.*

## PLEAS AND PLEADING IN EQUITY.

1. After a sale of a tract of land, the vendor, in consideration of natural love and affection, under his hand and seal assigned the unpaid purchase money to one of his grand-daughters, and then devised the land to his four grand-daughters, including his grantee, "to be equally divided among them." Upon a bill filed by the grantee of the purchase money against the vendee, the executors of the vendor, and her co-devisees, the latter agreed to a division of the balance of the purchase money among themselves, and to unite in a conveyance upon its payment, but one of the executors excepted to the averments of the bill under the act of 1832, ch. 302, on the ground that it did not charge him with the receipt of purchase money. **Held:** that the sufficiency of the bill upon the appeal of that executor as against him, was open to the consideration of this court. *Berry vs. Pierson*, 234.
2. Where a bill is properly excepted to upon the ground of the insufficiency of its averments to charge a party proceeded against, whatever may be the proof, no decree can be pronounced against him. *Ib.*
3. Proper and sufficient allegations in a bill are necessary to prevent surprise and consequent injustice. *Ib.*

See ACCOUNT STATED, 2. STATUTE OF FRAUDS, 5, 6, 7, 8.

POSSESSION OF LAND. See EJECTMENT, 12, 13, 14.

EVIDENCE, 59, 61, 62, 63, 64, 65.

LIMITATION OF ACTIONS, 11, 12.

PRESUMPTION OF LAW.

RIPARIAN PROPRIETOR.



POSSIBILITY. Not subject of grant. See LAND OFFICE, 20.

# PRACTICE.

1. Where the merits of an action at law depended in every aspect of it, upon the true construction of an agreement, every prayer which went to the right of action, and kept out of view the effect of the agreement, and so did not involve the true point of controversy between the parties, is considered as wholly abstract. *State use of Stevenson vs. Reigart*, 1.
2. A court is not to be called upon to settle legal principles which have no relevancy to the case before them. *Ib.*
3. Where, in the progress of a trial, the defendant excepted to instructions granted in favor of the plaintiff, and afterwards the judgment was arrested, but upon the appeal of the plaintiff, reversed, this court will not enter final judgment, but remand the cause for judgment on the verdict to the county court, in order that the defendant may have an opportunity of appealing from the instructions given against him. *O'Reilly vs. Murdoch*, 32.
4. Where a verdict is rendered for the plaintiff on two counts in a declaration, one of which contains no cause of action, the court will render judgment upon the other if legally sufficient. *Gordon vs. Downey*, 41.
5. The act of 1809, ch. 164, declares that judgment shall not be stayed after verdict for defect of any count in a declaration, where there is one good count. *Ib.*
6. Where the plaintiff counts upon a contract assigned to him, followed by an express promise by the defendant to pay him the sum alleged to be due under it, and the bill of exceptions does not show that the plaintiff had closed the testimony on his part, it is error in the court, upon the motion of the defendant, to reject the proof of the assigned contract. *Ib.*
7. In virtue of the act of 1831, ch. 319, this court is required in appeals from certain county courts enumerated in that act, to decide upon all the bills of exception taken at the trial below, whether appealed from or not. *Ib.*
8. Where a county court awards a new trial, it has power to authorize an amendment of the pleadings under the act of 1785, chapter 80, section 4. *Ib.*
9. Where a verdict is set aside and a new trial awarded, the case, as far as amendments are concerned, stands as if no trial had been had. *Ib.*
10. An application for an amendment of pleadings is not a demand of a matter of right, but is an appeal to the sound discretion of the court, and to be granted when it shall appear necessary to bring the merits of the question between the parties fairly to trial. *Ib.*
11. Where an application is made to the court to withdraw a general issue plea, and file a general demurrer, and the defendant's exception to a refusal to grant that privilege did not state the existence of any necessity for such amendment, and it did not appear that the amendment if made would have given the defendant any new

PRACTICE—*Continued.*

- defence, it is not error in the county court to refuse the amendment. *Ib.*
12. Where a bill of exceptions is sealed, the truth of the facts contained in it, can never afterwards be disputed. *Mitchell vs. Mitchell*, 66.
  13. Though a party cannot discredit his own testimony, yet he may show that his witness is mistaken; and is not precluded from showing the truth by any testimony, oral or written, which he may produce. *Wolfe vs. Hauver*, 84.
  14. It is the duty of parties where they design to introduce hearsay evidence for the purpose of impeaching a witness, to apprise the court of such design. *Ib.*
  15. It is incompetent to introduce illegal testimony, and then impeach the witness, by disproving the facts thus illegally established. *Ib.*
  16. In the absence of all proof to the contrary, judicial courtesy requires this court to presume, that the county court discharged its duty according to the rules and practice of such court, in awarding a commission to take testimony. *Calvert vs. Coxe*, 95.
  17. So where the county court assembled on the *first* day of the month, and proceedings were had in a cause, which resulted in the withdrawal of a juror, and on the *twenty-seventh* of the following month, the court ordered a commission on the motion of the plaintiff to be issued; but it did not appear when such motion was made, nor when, nor by whom commissioners were named, it is fair to presume, either that the defendant did name and strike commissioners, or that after reasonable notice, he failed to do so. *Ib.*
  18. The motion of a suitor seeking a commission to take proof, is that a commission be issued, naming the place to which he wishes it to be addressed. The court then grants the usual order to name and strike commissioners. *Ib.*
  19. The power of selecting the time and place of executing a commission to take testimony, addressed to commissioners out of *Maryland*, is confided by the terms of the commission, to their sound discretion. *Ib.*
  20. A commission, addressed to commissioners of the *District of Columbia*, may be executed in *Virginia*. *Ib.*
  21. In the execution of a foreign commission, no notice to the parties of the time and place of its execution is necessary. All the notice required, is that of the interrogatories sent out with the commission. Actual or constructive notice should be given to the opposite party in time for him to exhibit cross interrogatories before the transmission of the commission. *Ib.*
  22. Five days notice given to a defendant, a resident of *Maryland*, of the time and place of executing a commission in *Virginia*, about forty miles distant from his residence, is sufficient, and it is no objection that it was executed at the private residence of the witness. *Ib.*
  23. Where several witnesses are examined, the testimony of any one of them may be selected from the mass of proof with which it is connected, and made the subject of an instruction. *Ib.*

PRACTICE—*Continued.*

24. It is the privilege of a party to raise any question of law arising out of the facts of the case, and to demand the opinion of the court distinctly upon it. *Ib.*
25. If the opposite party believes that other facts not embraced in the hypothesis assumed, are properly calculated to justify an application for other and different instructions, he has the equal privilege of asking an opinion on the additional facts, but not the privilege of controlling and modifying the hypothesis of his antagonist, nor annexing modifications to it against the consent of the party moving it. *Ib.*
26. Where the language of an instruction is calculated to bias the mind of the jury upon a contested matter of fact, it is error. *Ib.*
27. It is a settled principle, that the court will not instruct the jury that there is no evidence of a material fact, if there be any evidence whatever tending to prove it. *Whiteford vs. Burckmyer & Adams*, 127.
28. A party may group into one instruction as many and as complicated facts as he pleases, to assume his testimony will prove, and ask the court to instruct the jury on the legal result of that mass of facts, but if amongst the enumerated facts there be such as it is not competent for the jury to act on, he must fail in his application. *Ib.*
29. Where the instruction given, authorised the jury to find one of three alternate and distinct propositions of fact, without saying which, it is error. It would be impossible for them to ascertain whether they were thereby authorised to find the first, second or third alternation. *Ib.*
30. If counsel present to the court a complicated and involved statement, which it will be difficult for the jury to understand distinctly, it will be a sufficient ground upon which the court should refuse to give a direction in the terms asked for. *Ib.*
31. The court is the proper tribunal to construe and determine the legal effect and construction of instruments of writing: but where deductions are to be drawn from the conduct of parties in the execution of such instruments, at the time, in the manner, and under the circumstances existing in the case, the jury are the proper forum to make such deductions. *Keefer vs. Mattingly*, 182.
32. The plea of limitations is classed among those not deemed meritorious, and in relation to the reception of which, courts of justice act with care and strictness, and must be filed by the rule day. *Nelson & wife vs. Bond*, 218.
33. A general continuance of a cause does not enlarge the time to file the plea of limitations. *Ib.*
34. A prayer to instruct the jury upon the foregoing evidence, that "the plaintiff is not, in the face of his said deed, entitled to recover for any damage done his mills by reason of the construction of the canal across said public road, and the destruction of said public road," involves no question upon the pleadings in the cause—nor whether the facts proved sustain the allegations in the declaration: it concedes the sufficiency of the pleadings, and only seeks a decision on the isolated question of the legal effect of the deed referred to, and that thereby the testimony given in the cause showed no cause of action. *Leopard vs. C. & O. C. C.*, 222.



PRACTICE—*Continued.*

35. The question raised by this prayer bears no resemblance to the inquiries the court is called upon to make, where objection is raised to the admissibility of evidence *offered generally*, in a trial before a jury. In such case the attention of the court is necessarily called to the pleadings, the admissibility of the evidence being entirely dependent on them. *Ib.*
36. Before the court can grant an instruction that a plaintiff is not entitled to recover, it must assume the truth of all the testimony given to the jury tending to sustain his right to recover, and of all inferences of fact fairly deducible therefrom. *Ib.*
37. The plaintiff proved that all the articles mentioned in his account, were *selected* by S, and that he *refused to deliver* them until he saw the defendant. He then asked the defendant, "will you pay for the goods if *delivered* to S, and he did not?" Defendant answered, if S did not pay, he would. The goods were then entered on the plaintiff's books, "*secured by*" defendant. Under such circumstances, the defendant cannot require the court to say to the jury, "that the promise to see the plaintiff paid, if S did not pay, not being in writing, is void by the statute of frauds, and plaintiff cannot recover," as it took from the jury the right of finding the truth of the facts of which evidence had been offered. *Conolly vs. Kettlewell and Wilson*, 260.
38. Where testimony has been offered, legally sufficient to warrant the jury in finding certain facts enumerated in the plaintiff's prayer, which gave him a right of action, he may upon the hypothesis, that the jury believe the evidence in the cause, and the facts enumerated, require the court to instruct them that he is entitled to recover to the extent of such right. *Harrison vs. M. & C. C. Co. Balt.* 264.
39. Where the county court undertakes of its own motion to add a qualification to a prayer granted at the request of a party, the qualification must be consistent with the original prayer, and not leave it doubtful or difficult to determine what was the scope or design of the entire instruction. *Ib.*
40. Upon motion of the defendant, the county court instructed the jury, "that if they find the expenses incurred and claimed in this action were not necessary to preserve the health of the city, and not necessary to prevent the introduction of the small pox by or through the instrumentality of the vessel, the persons, baggage or articles on board her," then the plaintiff cannot recover; and then added, "that the recovery must be limited to such amount of expenses as in the *opinion of the Health officer* was necessary to disinfect the vessel, cargo and passengers of said disease, and to prevent their propagating the same. **HELD:** that this was erroneous, because difficult to reconcile the two parts of the instruction so given, or to discover what was the instruction the court designed to give. *Ib.*
41. After a judgment of condemnation has been rendered in an attachment cause, if the defendant desires to move to quash the writ, re-

## PRACTICE—Continued.

gularly he should first move to strike out the judgment, and then make his motion to quash. *Boorman vs. Israel & Patterson, Ex'rs*, 372.

42. Without the short note showing the plaintiff's cause of action, and the issuing thereon of a *capias ad respondendum* or a summons, (as the case may be,) the proceedings in an attachment would be wholly irregular. *Ib.*
43. A prayer made in such form or terms that it would have a tendency to mislead the jury, as in the necessity of finding as a fact, what is an inference of law, should not be granted. *Casey's lessee vs. Inloes et al*, 430.
44. A party cannot call upon the court to instruct the jury where defence is taken on warrant, as to the effect of a patent not located upon the plats, nor given in evidence to the jury. *Ib.*
45. The court cannot be called upon to say that an original patent must be construed by reference to its relation to another patent, founded on a resurvey of the same land, where the second patent did not appear in evidence, and where the same parties claimed under both patents. *Ib.*
46. Where possession was essential to the acquisition of title to land, and title to the creation of a riparian right, any prayer founded on that right, which did not submit the fact of possession to the jury, should be rejected. *Ib.*

See PRACTICE IN CHANCERY.

IN COURT OF APPEALS.

See PRESUMPTION OF LAW.

## PRACTICE IN CHANCERY.

1. Where a bill is properly excepted to upon the ground of the insufficiency of its averments to charge a party proceeded against, whatever may be the proof, no decree can be pronounced against him. *Berry vs. Pierson*, 234.
2. One who is executor, and as legatee claims a right to purchase money received by him, is a proper party to a controversy to settle the right to the fund, that full and complete justice may be administered to all the persons interested in its distribution. *Ib.*
3. Where a bill gives a defendant no intimation that any claim would be made against him, but the demand appears in the proof, he may by way of exception to the auditor's report, rely upon the act of limitations, and it is no objection that it was not taken in the answer. *Ib.*
4. The defence of limitations may be taken in equity as soon as by the proceedings, the party has notice that any claim was to be made against him. *Ib.*
5. By the act of 1830, ch. 185, it was declared that no appeal shall hereafter be allowed from any decree or order of the Court of Chancery, unless it be a final decree or order in the nature of a final decree. HELD: that an appeal from an order referring a cause to the Auditor, for an account, with directions as to the mode of stating it, was not authorised under that act. *Ib.*

## PRACTICE IN COURT OF APPEALS.

1. Where, in the progress of a trial, the defendant excepted to instructions granted in favor of the plaintiff, and afterwards the judgment was arrested, but upon the appeal of the plaintiff, reversed, this court will not enter final judgment, but remand the cause for judgment on the verdict to the county court, in order that the defendant may have an opportunity of appealing from the instructions given against him. *O'Reilly vs. Murdoch*, 32.
2. In virtue of the act of 1831, ch. 319, this court is required in appeals from certain county courts enumerated in that act, to decide upon all the bills of exception taken at the trial below, whether appealed from or not. *Gordon vs. Downey*, 41.
3. Will an appeal lie from the decision of the county court exercising its discretion, in allowing or refusing an amendment of the pleadings? *Qr. Ib.*
4. Where the county court, after verdict for the plaintiff, upon motion arrested the judgment, and there was no error in the bills of exception taken by the defendant, this court overruling the motion in arrest, will proceed to enter final judgment upon the verdict for the plaintiff. *Ib.*
5. Where a defendant is not prejudiced by the erroneous instruction of the court below, or where such an instruction is beneficial to him, this court, upon his appeal, will not therefor reverse the judgment. *Mullikin vs. Boyce*, 60.
6. Where the only question presented for the consideration of the court below, was the admissibility of the parol evidence offered, this court will not, since the act of 1825, ch. 117, entertain the enquiry, whether the particular action brought will lie for want of written evidence as required by the statute of frauds. *Wolfe vs. Hauver*, 84.
7. Where the bill of exceptions does not assert that the evidence offered, was all which was adduced by the plaintiff, this court will not assume that it contained all that was produced, for the purpose of raising a question, not presented by the record. *Ib.*
8. A defendant below, cannot assign for error (when appellant,) the results of any of his own modifications or additions to the prayer of the plaintiff below. If there be any error for which a judgment in this case should be reversed, it must be found in the addition made by the plaintiff to the instruction as modified and amended at the defendant's instance. *Calvert vs. Coxe*, 95.
9. It is error in the county court to instruct a jury absolutely, though they might have been authorised to grant the same instruction hypothetically. *Ib.*
10. To entitle an appellant to a reversal for error in instructions, he must make good all the propositions contained in his motion, however numerous they may be. *Whiteford vs. Burckmyer and Adams*, 127.
11. Where a record of proceedings in Chancery does not appear in the bill of exceptions, this court cannot decide whether the county court erred in rejecting it as evidence or not. *Duvall vs. Peach*, 172.



PRACTICE IN COURT OF APPEALS—*Continued.*

12. This court is limited by the act of 1825, ch. 117, to the consideration of the questions presented to the county court upon the bills of exceptions. *Keefer vs. Mattingly*, 182.
13. Where the county court maintained the invalidity of an insolvent debtor's release relied upon in bar of the plaintiff's action, and the jury found accordingly, and also, that the insolvent since his release had obtained goods &c., by descent, &c., in his own right; this court disagreeing with the county court and holding the release valid, will award a procedendo to try the question of subsequent acquisition by the debtor within the exceptions of the act of 1805, ch. 110. *Bowie vs. Jones*, 208.
14. Under the act of 1825, ch. 117, this court is not permitted to affirm or reverse the judgment of the county court upon any point, which is not shown by the record to have been *there* raised and decided. *Leopard vs. C. & O. C. Co.* 222.
15. A prayer to instruct the jury upon the foregoing evidence, that "the plaintiff is not, *in the face of his said deed*, entitled to recover "for any damage done his mills by reason of the construction of "the canal across said public road, and the destruction of said public "road," involves no question upon the pleadings in the cause—nor whether the facts proved sustain the allegations in the declaration: it concedes the sufficiency of the pleadings, and only seeks a decision on the isolated question of the legal effect of the deed referred to, and that thereby the testimony given in the cause showed no cause of action. *Ib.*
16. The question raised by this prayer bears no resemblance to the inquiries the court is called upon to make, where objection is raised to the admisibility of evidence *offered generally*, in a trial before a jury. In such case the attention of the court is necessarily called to the pleadings, the admisibility of the evidence being entirely dependent on them. *Ib.*
17. Where limitations are relied on in equity, and the court therefore deem it fruitless to proceed with the cause, though the claim could in other respects be maintained by an amendment of the pleadings, it will not be remanded. *Berry vs. Pierson*, 234.
18. Upon a *scire facias* against special bail, where the defendant did not plead to the writ, but moved the court to enter an *exoneretur*, which being done, the plaintiff thereupon appealed. This court dismissed the appeal, there being no final judgment in the cause. *McArthur vs. Martin & McDermot*, 259.
19. Where the plaintiff below obtained a verdict, and the defendant brought the cause before this court on exceptions, and it appeared that the contract relied on and proved, was void under the statute of frauds, being a collateral, and not an original undertaking. After a reversal of the judgment, the plaintiff's motion for a procedendo was overruled. *Conally vs. Kettlewell & Wilson*, 260.

PRACTICE IN COURT OF APPEALS—*Continued.*

20. This court will not pronounce upon the rights of a residuary legatee for life, with a bequest over to others, where the record does not contain the will under which the legatee claims. *Bowling & wife vs. Lamar, ad'r*, 358.
21. The orphans court passed certain claims against a deceased's estate, when the administrator came to settle his administration account, the claims were objected to, and full proof of them demanded, but the court allowed them. Upon appeal, this court reversing the decision of the orphans court, remanded the cause without prejudice, with liberty to take further proof. *Ib.*
22. This court will not reverse a judgment of condemnation in an attachment cause upon an appeal from such judgment, for errors which do not appear to have been presented to the consideration of the county court, or that it made any decision in relation thereto. *Boarman vs. Israel and Patterson, Ex'rs*, 372.
23. Where a special limited jurisdiction, distinct from and not embraced by its general jurisdiction, is conferred by act of Assembly on any tribunal, its powers to act as it has done must appear upon the face of its proceedings. *Ib.*
24. When those proceedings are brought for review in this court, it must appear from their inspection, that every thing has been done which the law required, as the basis of the authority which has been exercised. *Ib.*
25. The act of 1825, ch. 117, interposes no obstructions to enquiries into such a subject. It has no application to them. *Ib.*
26. Where an affidavit is designed to procure a warrant for an attachment against the effects of an *absconding debtor*, under the act of 1795, and does not contain an averment of his citizenship of *Maryland*, it is substantially defective; and upon an appeal from a judgment of condemnation rendered upon it, without a motion to that effect in the county court, the judgment will be reversed and the attachment quashed. *Ib.*
27. By the act of 1830, ch. 185, it was declared that no appeal shall hereafter be allowed from any decree or order of the Court of Chancery, unless it be a final decree or order in the nature of a final decree. **Held:** that an appeal from an order referring a cause to the Auditor, for an account, with direction as to the mode of stating it, was not authorized under that act. *Darrington vs. Rogers*, 372.

*See* PRACTICE.

PRACTICE IN CHANCERY.

## PRESUMPTION OF LAW.

1. The court will not instruct the jury after a lapse of seventeen years merely, to presume the death of the patentee of land. *Lee vs. Hoye*, 188.
2. A death of a patentee will not be presumed to support a title to land, acquired in violation of the law, and rules of the land office. *Ib.*

PRESUMPTION OF LAW—*Continued.*

3. A partial possession of land, with a general claim of title for fifteen years, will not authorise the presumption of a conveyance to such claimant. *Ib.*
4. A prevalent opinion, in the neighborhood of the premises claimed in an action of ejectment, even if known and adopted by the lessor of the plaintiff, as to her legal rights, whether founded in error or not, does not, at law, prevent the running of the statute of limitations, nor repel the legal presumption of a grant arising from long continued, and acquiesced in, adverse possession. *Casey's lessee vs. Inloes et al*, 430.
5. Where a tract of land was patented in 1663, and no conveyance from the patentee, but a deed for the same land in 1685 was in proof, from *W* to *J*, and another deed for the same tract in 1689, from *B* to *T*, with proof of title, from *T* to the lessor of the plaintiff, who brought her action of ejectment in 1841, but no evidence that *W*, *J*, or *B* had ever been in possession, or how *W* or *B* acquired or claimed title, the court cannot be called upon to instruct the jury that they are bound to presume a deed from the patentee or those claiming under him, to *W*, or from *J* to *B*, or his ancestor, for such tract of land; though it would have been competent to have required an instruction to the jury that they must presume a deed from the patentee, or those claiming under him, to *B*, from whom the paper or record title was perfect. *Ib.*
6. A continuous possession of twenty years or upwards, in a party, or those claiming under him, will authorise him or them to supply the absence of a conveyance to such party from one seized before him, by requiring the court to instruct the jury to presume such a conveyance. *Ib.*
7. The grounds on which the presumption of a deed rests at law, are, that the rightful owner has so long submitted to acts of ownership over his property, exercised by another, without ever having sued for the recovery of his property, or damages for the unlawful invasion of his rights, that he is presumed to have granted them to him, by whom the acts of ownership are exerted. *Ib.*
8. Where several defendants, in an action of ejectment, claim title to several and distinct parcels of the land sued for, as by separate and independent leases, and there is no evidence to show any possession in any person under whom two or more of the defendants claim to derive title, a presumption of a grant, founded on the possession of the claimant of one lot, cannot enure to the benefit of the claimant of a separate and distinct lot, of which no such possession had ever been held. *Ib.*
9. The presumption of a grant is an inference of law arising out of particular facts, and may exist, although the jury, in their consciences, may disbelieve the actual execution of any such grant. *Ib.*
10. In a case where a jury may be authorised to presume a grant to defendants in possession, such presumption may be made, either of a grant from the plaintiff, or from any person under whom the plaintiff derived title, according to the proof. *Ib.*
11. When a court as an inference of law, arising from proof of possession, directs a jury to presume a deed, it is done upon principles of public policy, for the protection of ancient possessions. *Ib.*



**PRESUMPTION OF LAW—Continued.**

12. All that the law requires to raise the presumption is, that the possession should have been actual, adverse, exclusive, and continuous, and under claim of title. *Ib.*

*See EVIDENCE, 20.*

**EXECUTOR AND ADMINISTRATOR, 7.**

**LAND OFFICE.**

**LIMITATION OF ACTIONS, 13, Sec. 2nd.**

**ORPHANS COURT, 11, 12, as to presumptions in relation to executors and legacies.**

**PRACTICE, 16, 17.**

**PRINCIPAL AND SURETY.**

1. Where the condition of a collector's bond, was, that he shall well and truly account for and pay over to the treasurer of the State, the several sums of money which he shall receive or be answerable for by law, *at such time as the law shall direct,*" it is no change or alteration of the terms of the contract, that the legislature appointed a more distant day, than the one fixed when the bond was executed, for the payment of the money collected into the treasury. *State vs. Carleton et al, 249.*
2. The granting of indulgence by law to a principal collector of the State does not discharge his sureties, though without their consent. *Ib.*

**PROCEDENDO. PRACTICE IN COURT OF APPEALS, 13.**

**PROTEST OF BILLS AND NOTES. See NOTARY PUBLIC.**

**BILLS OF EXCHANGE.**

**PURCHASERS. See JUDICIAL SALES.**

**FIERI FACIAS.**

**QUANTUM MERUIT. See ASSUMPSIT, 10.**

**ATTORNEY AT LAW, 1.**

**QUARANTINE REGULATIONS. See MAYOR AND C. C. OF BALTIMORE.**

**RECEIPT. See DEED.**

**REGISTER OF WILLS. See ORPHANS COURT.**

**RELATION—Escheat to original patent—See LAND OFFICE, 18, 19.**

**RELEASES. See ORPHANS COURT, as to recording them, 2, 3.**

**RENT ROLLS.**

1. A certified copy of the rent-roll, extracted from the debt books of the Lord Proprietary, under the hand and seal of the Register of the Land office, having relation to the possession of the tract of land claimed in an action of ejectment, is competent evidence for the defendant in all cases of controverted possession, or when possession is relied on as evidence for the presumption of a grant. *Casey's lessee vs. Inloes et al, 430.*
2. The rent-rolls are books which were kept in the several counties of the State, during the Proprietary Government, by officers called rent-roll keepers, and were designed to show, in the respective counties,

**RENT ROLLS—Continued.**

the grants of land made by the Lord Proprietary, the names of the subsequent alienees thereof, of those who were in possession of the same, and the quit-rents with which they were chargeable. *Ib.*

**REPLEVIN.**

1. The action of replevin is appropriately applied to all cases in which the plaintiff seeks to try the title of personal property and recover its possession. *Brooke vs. Berry*, 153.
2. **E**, by articles under seal, agreed with **W**, that for the consideration thereafter mentioned, he would furnish him with negroes, &c., "all which property is to remain with the said **W**, on the land where he now resides, for and during the term of ten years, and to pay him annually the sum of, &c. **W** agreed that he would pay **E** one-half of the crops made during the above time, and would superintend and look after all **E**'s business." On the execution of the agreement, the negroes were delivered to **W**, and remained with him several years, when they ran away and came into the possession of **E** and **R**, the other defendant in the writ. **HELD**: that *replevin* was an appropriate remedy for **W**; and he was not bound in order to maintain it, either to show a performance, or a readiness to perform the agreement on his part, and that the contract gave him a present and immediate right to the negroes, and to possession for ten years from its execution. *Ib.*
3. **E** in 1837, conveyed certain negroes to **W**, to be retained by him for ten years; some time after the negroes ran away, and came again to the possession of **E**, who in February, 1840, executed a deed of trust of all his estate to **R**. In an action of replevin, brought in May, 1840, by **W** against **E** and **R** for the negroes, the defendants proved that in March, 1840, **R** called on **W**, and informed him of his deed, and that he came to demand the land, negroes, &c., of **E**, then in **W**'s possession, who said there are the negroes, go and take them, I have no title to them, but I will not give up the land; that two of the negroes in controversy were then in view of the parties at work with other negroes, proved to have been the property of **E**. Under such a state of facts, the plaintiff, *for the purpose of rebutting the inference that he surrendered and abandoned all right in the negroes*, may show that immediately after the demand made upon him by **R**, that he, **R**, and the witness who proved it, went to the residence of **E**, where **W** asked him in the presence of all the parties, whether he had authorised **R** to interfere with the property mentioned in the agreement of 1837, and that **E** replied he had not, that his intention was to convey his residuary interest in the property in **W**'s possession. *Ib.*

**RIPARIAN PROPRIETOR.**

1. By the act of 1745, ch. 9, sec. 10, "all improvements, of what kind soever, either wharfs, houses, or other buildings, that have or shall be made out of the water, or where it usually flows, (as an encouragement for such improvers,) be forever deemed the right, title and inheritance

RIPARIAN PROPRIETOR—*Continued.*

of such improvers, their heirs and assigns forever." In the year 1693, a patent issued for a parcel of land called *M's Neck*, lying in *Chesapeake Bay*, and on the *N.* side of a river called *Patapsco*, and on the *N.* side of the *N. W.* branch of said river: Beginning at a marked red oak by a little branch, and running up along the *N. W.* branch, for breadth, *W. N. W.* 100 p. over a cove unto a marked white oak, &c.  
**HELD:**

- 1st. That the patentee of this land, and those claiming under him, had by virtue of the act of 1745, a mere privilege of acquiring property by its reclamation from the water; that until reclaimed, she had no property; no possession; no right, under that act.
  - 2nd. That a party, by erecting a fence for thirty years and upwards, on a part of the low grounds adjacent to such tract designated as the cove, in front of that part of *M's Neck* claimed by the plaintiff, which was covered by the flow of the tide, and claiming below it, did not furnish evidence of such an uninterrupted, continuous possession, as was essential to the presumption of a grant to the person making and extending such fence.
  - 3rd. That being erected on navigable water, without the limits of the land owned by the patentee, it gave him no right of action.
  - 4th. That ejectment would not lie, there being no title in the land.
  - 5th. That trespass, in which the law implies an injury, whether sustained or not, could not be maintained for want of ownership in the soil.
  - 6th. A party in possession of land adjacent to a navigable stream, who runs a fence from his land into the stream, across the front of another adjacent proprietor, gains no possession by such an act, which is in itself a trespass. *Casey's lessee vs. Inloes et al*, 430.
2. As far as regards any conflict of rights *between the parties to this cause*, the defendants, under the act of 1745, had a right to extend westwardly in front of their lots to the west side of *Caroline street* and no further; and the lessor of the plaintiff had a right to extend her grounds to the *City Dock*, on the south side of *Lancaster st.* *Ib.*
  3. A grant, though for the most part covered with water, still passes to the grantee all the soil under the water, included within its outlines, with all the rights of property incident thereto, subject only to the rights of the public as to fishing and navigation. If encroached on, the grantee may maintain trespass or ejectment. *Ib.*
  4. The act of 1745, ch. 9, never was designed to give one land-holder the power of extending his improvements over the land of another. *Ib.*
  5. The right of the riparian proprietor to extend his improvements into the water, is intercepted by a grant from the State to another person of the land covered by the water of a navigable stream, over which such proprietor might otherwise have been entitled, under the act of 1745, to make improvements. *Ib.*
  6. The heir of lessee for a term of years of a lot bordering on the water, under the act of 1745, ch. 9, sec. 10, is not the riparian proprietor of such lot. *Ib.*



**RULES OF COURT.** See JURISDICTION, 2.

**SCIRE FACIAS**—against special bail. See PRACTICE IN COURT OF APPEALS, 18.

**SHORT NOTE.** See PLEAS AND PLEADING, 22, 23.

**SPECIAL BAIL.** See PRACTICE IN COURT OF APPEALS, 18.

**STATE OF MARYLAND.**

1. Upon an escheat the State takes as the *ultimus hæres* of that, to which, the person was entitled, whose death, without heirs, created the escheat. *Casey's lessee vs. Inloes*, 430.
2. An escheat grant, in one sense of the term, is the creation of a *feudum novum*; the grantee takes the property granted as a new fief or feud, so far as regards his relationship, obligations, and duties to the State, and the estate, upon the terms specified in the grant. *Ib.*
3. But the limits, privileges, appurtenances, and priorities of the estate granted by escheat patent, and the liens and incumbrances to which it may be subjected, exist independently of the inquiry, whether the grant be of an ancient or a new feud. *Ib.*
4. The State acquires by escheat, not only that which was originally granted, but all the rights, privileges, priorities and appurtenances incident to the land itself, and with which it was held by the person who died seized without heirs. *Ib.*
5. The escheat grantee, upon the terms specified in his grant, takes the estate granted in the same condition in which it may have devolved on the State, except so far as it may be affected by the doctrine of merger or extinguishment. *Ib.*
6. An escheat grant relates to the original grant, and passes to the escheat grantee all that passed to the original grantee, and which was held by him, whose death, without heirs, occasioned the escheat. *Ib.*
7. The relation of the escheat grant to the original grant is not intercepted by an intermediate patent, unless, at the time of granting the same, the escheat right had accrued. *Ib.*
8. Until the occurrence of the event which constitutes the escheat, the interest of the Lord Proprietary in relation to it, was a mere possibility, and could not be the subject of a grant. *Ib.*

**STATUTE OF FRAUDS.**

1. A defendant who places his defence upon the finding by the jury, "that the compensation claimed by the plaintiff of the defendant, was, according to the agreement of the parties, to be paid out of the estate of C, in the hands of the defendant's testator," cannot ask the court to instruct the jury, that his testator was not personally liable, though the compensation had not been paid. The failure to pay out of C's estate was a breach of the contract, for which the testator was personally liable. *Calvert vs. Coxe*, 95.
2. At a sale of land under execution, P agreed with D, that if D would purchase the land, he the said P, would invalidate certain deeds therefor, and put him in possession. **Held:** that this agreement

STATUTE OF FRAUDS—*Continued.*

being merely by parol, is void at law under the statute of fraud. *Duvall vs. Peach*, 172.

3. The plaintiff proved that all the articles mentioned in his account, were *selected* by S, and that he *refused to deliver* them until he saw the defendant. He then asked the defendant, "will you pay for the goods if *delivered* to S, and he did not?" Defendant answered, if S did not pay, he would. The goods were then entered on the plaintiff's books, "*secured by*" defendant. Under such circumstances, the defendant cannot require the court to say to the jury, "that the promise to see the plaintiff paid, if S did not pay, not being in writing, is void by the statute of frauds, and plaintiff cannot recover," as it took from the jury the right of finding the truth of the facts of which evidence had been offered. *Conolly vs. Kettlewell and Wilson*, 260.
4. In effect, the proof in the case, if believed by the jury, subjected the defendant to separate and secondary, and not an original or a joint responsibility. *Ib.*
5. It is a general rule that, if the answer to a bill denies the existence of *any* parol contract for the sale of lands, and insists upon the benefit of the statute of frauds, the case cannot be made out by parol proof, and the bar of the statute is complete: but there is an exception to this rule, resulting from a part performance of the contract, established by many decided cases. *Hall and wife vs. Hall et al*, 383.
6. The evidence of part performance of a parol contract for the sale of lands, in the delivery of possession, or payment of purchase money, need not to be in writing, where such evidence is admissible as acts of part performance, to take a case out of the statute of frauds. *Ib.*
7. The statute of frauds was designed to exclude oral evidence of the agreement of sale; not oral evidence of the acts of part performance, or things done in execution of the agreement. *Ib.*
8. Where a complainant relies upon acts of part performance, to take a parol agreement for the sale of lands (denied by the answers,) out of the operation of the statute of frauds, it is his duty to offer full and satisfactory evidence of the terms of such agreement, and of the performance of it on his part, to entitle him to a decree for specific execution. *Ib.*

SURVEYORS. See EVIDENCE, as to the effect of their certificates, 63, 68.

TAXES. See COLLECTORS OF COUNTY LEVIES AND TAXES.

CONSTITUTIONAL LAW, 3, 4, 5, 6, 7.

TORTS. See JUSTICES OF THE PEACE.

COUNTY COURTS, 1.

TRESPASS—Q. c. f.

In trespass the law implies an injury whether sustained or not, but it will not lie where there is no ownership in the soil. *Casey's lessee vs. Inloes et al*. 430.

VERDICT. See PLEAS AND PLEADING, 14.

WAIVER. See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 2.

WARRANT OF RESURVEY.

See LAND OFFICE.

DEFENCE ON. See EVIDENCE, 70.

WIFE'S EQUITY. See HUSBAND AND WIFE.

WILL AND TESTAMENT.

1. In every case where a will is to be construed, the great object is to ascertain, from the face of the paper, the intention and design of the testator, which is to be carried into effect, unless opposed by some principle of positive law. *Jones vs. Earle, Ex. of Jones*, 395.
2. The will and the codicil constitute one instrument; and the codicil revoking in terms a portion of the will, has the effect to republish the will as of the date of the codicil, in respect to all parts of the will not revoked by the codicil, either in express terms, or by a bequest or devise, so entirely inconsistent with the terms of the will as to make it impossible to give effect to both. *Ib.*
3. A testator devised his slaves, in trust, to be manumitted as they severally arrived at the age of forty years, or immediately upon his real estate devolving on his grand nephew, should it come to his hands; and, *in trust also for the term they have to serve*, for the use of his wife and any child he may have by her, for and during the term of her natural life, and after her death for the use of any child that may survive her. By a codicil he revoked "that part of his will which manumitted his servants as they severally arrived at the age of forty years, and devised them to his wife, for and during her natural life, and *after her death* then said servants to be free; but in case that any of said servants shall runaway, and afterwards be apprehended, they shall forfeit their freedom and be sold for life." After the testator's death some of the servants ran away, and were sold by the widow as slaves for life. The trustee under the will claimed the proceeds for the purpose of investment, and brought an action at law, (in which all errors of pleading were waived,) to recover them. HELD: that the widow was entitled to the fund absolutely. *Ib.*
4. It is only where, by gratifying a particular intent as to a part of a will, a more general and more important disposition of other parts of it are defeated, that the particular or minor intent must yield. Where both may be gratified there is no conflict, and consequently no necessity to yield either. *Ib.*
5. A bequest of freedom to slaves, as they arrived at a particular age, is not a legacy to them; nor, when it is granted upon condition of good behavior, will its forfeiture create a lapse, though the bequest of freedom is defeated, the right of the slave after forfeiture, nor to his proceeds after a sale, not being expressly bequeathed to any person. *Ib.*
6. Where there is a bequest of slaves for life, and of freedom after the death of the tenant for life, a clause in the will declaring forfeiture of freedom in case of running away and a sale for life upon their



WILL AND TESTAMENT—*Continued.*

- apprehension, is designed for the benefit of the tenant for life, to secure the good conduct of the slaves, and the proceeds of any such slave sold for absconding, in the absence of any provision to the contrary by the testator, will belong to the legatee for life. *Ib.*
7. The election of a widow to stand upon her legal rights, though it occasion loss to devisees under her husband's will, is still a loss resulting by operation of law, and against which the testator only could have provided an indemnity. *Darrington vs. Rogers*, 403.
  8. By the election of a widow to renounce her husband's will, all devises and bequests made to her are inoperative and void; and the property given to her, except so far as it may be diminished by the exertion of her legal rights, remains as if no such devises to her had been made. *Ib.*
  9. Apart from the act of 1810, concerning lapsed legacies and devises, it stands precisely in the condition in which it would have stood had the wife died in the life-time of the testator. *Ib.*
  10. Where the testator directed the sale of all his real and personal estate, and disposed of the proceeds of sale, and all the residue and remainder of his estate generally, the one moiety to trustees for the benefit of his wife and children in the manner specified in his will, and the other moiety to trustees for the benefit of the complainants, if, from any cause, the legacy to the wife lapsed, it could not sink into the general residue. *Ib.*
  11. Where a testator divided the residue of his estate into moieties, and devised them to two distinct classes of devisees, one of them his children and heirs-at-law, the other collateral relations, but directed that his widow should have a portion of the moiety given to the children in lieu of dower, and she renounced the will, her portion will be deducted from the moiety given to the collateral relations, as the legacy to her, in consequence of her renunciation, becomes a residuum unaffected by any testamentary disposition, and as such vests in the testator's heirs or next of kin. *Ib.*

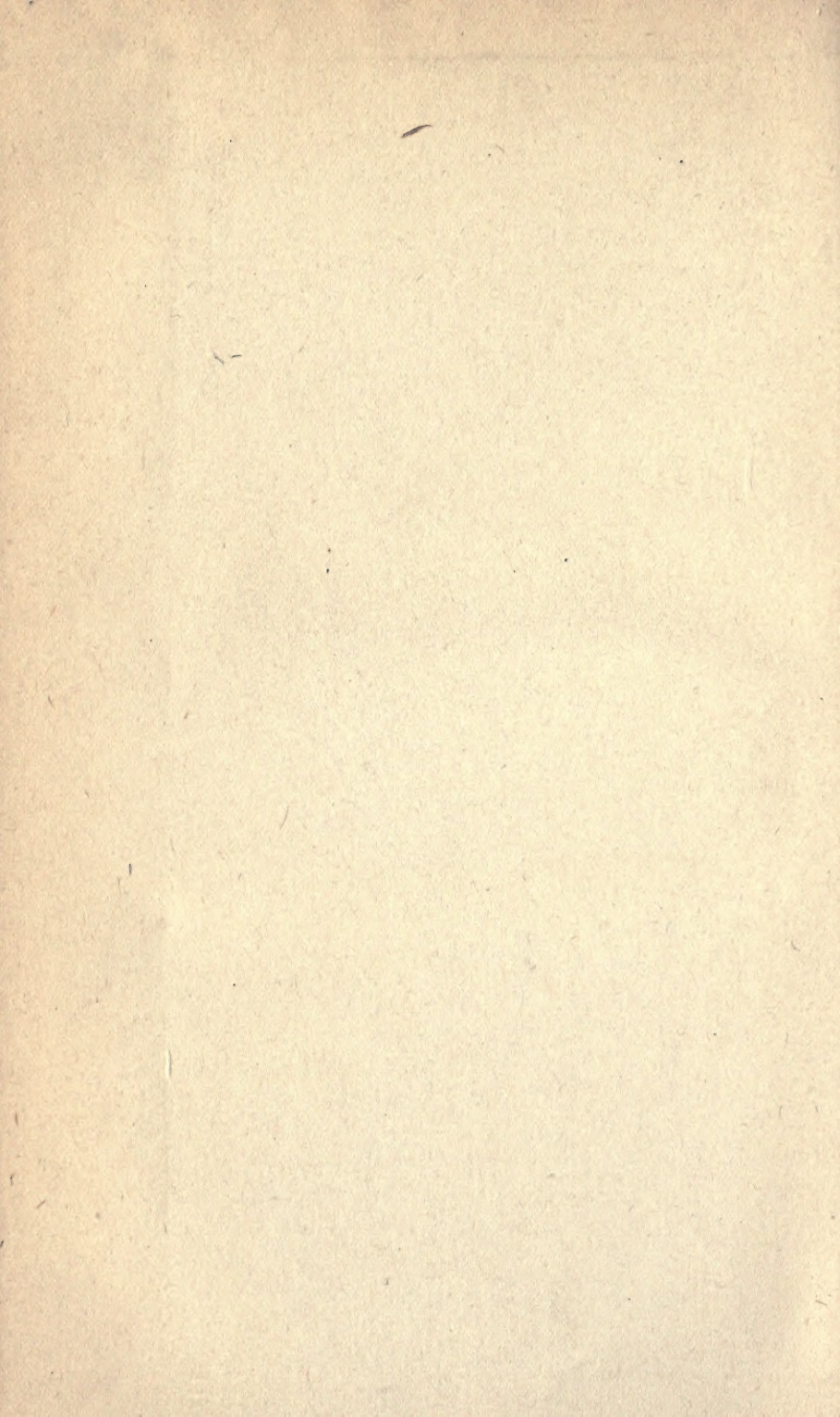
WRIT. See PLEAS AND PLEADING, 22, 23.













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